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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 57

COURTNEY M. MABEE, CHARLES K. BARNUM,
EDWARD G. TOMPKINS, ET AL., PETITIONERS,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

PETITION FOR CERTIORARI FILED APRIL 12, 1945.

CERTIORARI GRANTED MAY 21, 1945.

SUPREME COURT OF THE UNITED STATES

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**IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY**

COURTNEY M. MABEE, CHARLES K. BARNUM, TERESA FLINTOFT,
Edward R. Salter, Edward G. Tompkins, Norton Mock-
ridge, John M. Page, George S. Trow and William L.
O'Donovan, Plaintiffs,

against

WHITE PLAINS PUBLISHING COMPANY, Inc., Defendant

SUMMONS

To the Above Named Defendant:

You Are Hereby Summoned to answer the complaint in this action and to serve a copy of your answer, or if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiffs' Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated: July 20, 1942.

Stephen R. J. Roach, Attorney for Plaintiffs, 175
Main Street, White Plains, N. Y.

[fol. 5] **IN SUPREME COURT OF NEW YORK, WESTCHESTER
COUNTY**

[Same Title]

AMENDED COMPLAINT

For a cause of action in favor of plaintiff Courtney M. Mabee, said plaintiff alleges:

1. Plaintiffs bring this action to recover from defendant unpaid overtime compensation and an additional equal amount as liquidated damages, and counsel fees pursuant to Section 16(b) of the Fair Labor Standards Act of 1938.

2. Jurisdiction is conferred on this Court by Section 16(b) of the Act. The act has been in effect since October 24, 1938.

3. Defendant at all times herein mentioned was, and still is, a domestic corporation and at all times hereinafter mentioned was engaged in the collection of news emanating from all parts of the United States, and printing, publishing and circulating a daily newspaper known as "The Daily Reporter," its plant and place of business, at all times hereinafter mentioned, being at White Plains, Westchester County, New York.

4. That at all times hereinafter mentioned the newspaper so published by defendant was made and consisted of material much of which was shipped and sent to defendant's place of business from points outside the State of New York, said material consisting of raw material for the making of said newspaper, and advertising, news syndicated features, reports, services, etc.

[fol. 6] 5. That defendant, at all times hereinafter mentioned sent, mailed and delivered its said newspaper outside the State of New York, to various parts of the United States, and did not confine its circulation to the State of New York.

6. That the business of publication of a newspaper, in which defendant was at all times hereinafter mentioned engaged, was, at all times, and still is, of vital importance to the national welfare, in the dissemination among the people of fresh, accurate and world-wide news of current events and conditions through the instrumentality of newspapers, and thus newspapers supply a necessity and their business effects the national interest.

7. That defendant in its said business was engaged in interstate commerce and in the production of goods for interstate commerce.

8. That plaintiffs herein at all times hereinafter mentioned were engaged in interstate commerce and in the production of goods for interstate commerce, in connection with their work for defendant.

9. That the employment of each of the plaintiffs herein, at all times hereinafter mentioned, was within the scope of

said Fair Labor Standards Act of 1938, and particularly Section 7 thereof.

10. That although the burden of proof with respect to the following is on the defendant herein, each plaintiff alleges that each plaintiff was not within any of the exceptions or exemptions set forth in any portion of said Act.

[fol. 7] 11. That said newspaper at all times hereinafter mentioned was a daily newspaper and had a circulation of over three thousand.

12. That each plaintiff herein was at the times hereinafter mentioned employed by defendant in connection with the making and publication of said newspaper.

13. That none of the plaintiffs herein was employed at any of the times hereinafter mentioned, pursuant to any agreement made by defendant with any representative as a result of collective bargaining.

14. That pursuant to the provisions of said Act, which went into effect October 24, 1938, each plaintiff herein became entitled to receive from defendant overtime pay, at the rate of one and one-half times the regular rate at which such plaintiff was employed for a work week longer than forty-four hours during the first year from the effective date of said Act, for a work week longer than forty-two hours during the second year from such date, for a work week longer than forty hours after the expiration of the second year from such date, together with interest thereon.

15. That, in addition thereto, each plaintiff, pursuant to the provisions of said Act, has become entitled, to an additional sum equal to the total of said overtime pay, together with interest thereon.

16. That in addition thereto, pursuant to the provisions of said Act, each plaintiff is entitled to a reasonable attorney's fee to be paid to each plaintiff by defendant herein.

[fol. 8] 17. That the duties performed by each plaintiff herein, at the times hereinafter mentioned, were essential parts of the production, preparation, and circulation of defendant's said newspaper, and that the duties of each plaintiff constituted the production of goods for commerce within the meaning of said Act and each plaintiff was engaged in commerce within the meaning of said Act.

18. That plaintiff Courtney M. Mabee at all times therein mentioned was employed by defendant in gathering news and editing same and said plaintiff assisted defendant in the preparation and publication of said newspaper.

19. That from October, 1938 to May 15, 1940, plaintiff Courtney M. Mabee, was employed at the regular rate of \$52.50 per week.

20. That from May 15, 1940 to September 15, 1940 plaintiff Courtney M. Mabee was employed by defendant at the regular rate of \$47.50 per week.

21. That from September 15, 1940 to March 1, 1941 plaintiff Courtney M. Mabee was employed by defendant at the regular rate of \$40.00 per week.

22. That at no time during said periods did plaintiff Courtney M. Mabee receive any pay or compensation for any overtime work or any compensation above said regular salary.

23. That plaintiff Courtney M. Mabee from October 24, 1938 to October 24, 1939, worked at least nineteen hours weekly over forty-four hours weekly, and became entitled to \$33.82 per week for such overtime work.

[fol. 9] 24. That plaintiff Courtney M. Mabee from October 24, 1939 to May 15, 1940, worked at least twenty-one hours weekly over forty-two hours weekly, and plaintiff Courtney M. Mabee became entitled to \$37.38 per week for such overtime.

25. That plaintiff Courtney M. Mabee from May 15, 1940 to September 15, 1940, worked at least twenty-one hours weekly over forty-two hours weekly, and, plaintiff Courtney M. Mabee became entitled to \$35.49 per week for such overtime work.

26. That plaintiff Courtney M. Mabee from September 15, 1940 to March 1, 1941 worked at least thirty-five hours weekly over forty hours weekly and plaintiff Courtney M. Mabee became entitled to \$52.50 per week for such overtime work.

27. That, by reason of the premises, plaintiff Courtney M. Mabee became entitled to receive from defendant, for overtime pay the following sums, together with interest

thereon; for the period from October 24, 1938 to May 15, 1940, \$2,845.28, for the period from May 15, 1940 to September 15, 1940, \$567.84, for the period from September 15, 1940 to March 14, 1941, \$1,155.00; for a total of \$4,568.12, no part of which has been paid.

28. That, by reason of the premises, defendant is liable to plaintiff Courtney M. Mabee in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of [fol. 10] this action, all pursuant to the provisions of said Act.

Wherefore, plaintiff Courtney M. Mabee demands judgment for the sum of \$9,136.24 plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by the defendant, together with the costs and disbursements of this action.

And for a cause of action on behalf of Charles K. Barnum, said plaintiff alleges

29. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

30. That plaintiff Charles K. Barnum at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

31. That from October, 1938 to January 12, 1939, plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$27.50 per week.

32. That from January 12, 1939 to October 24, 1939, plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$32.50 per week.

33. That from October 24, 1939 to June 1, 1940 plaintiff Charles K. Barnum was employed by defendant at the regular rate of \$32.50 per week.

34. That at no time during said periods did plaintiff [fol. 11] Charles K. Barnum receive any pay or compensation for any overtime work, or any compensation above-said regular salary.

35. That plaintiff Charles K. Barnum, from October 24, 1938 to January 12, 1939, worked at least twenty-nine hours weekly over forty-four hours weekly, and became entitled to \$27.55 per week for such overtime work.

36. That plaintiff Charles K. Barnum from January 12, 1939 to October 24, 1939 worked at least twenty-one hours weekly over forty-four hours weekly, and plaintiff became entitled to \$23.31 per week for such overtime work.

37. That plaintiff Charles K. Barnum from October 14, 1939 to June 1, 1940 worked at least twenty-three hours weekly over forty-two hours weekly, and plaintiff became entitled to \$26.45 per week for such overtime work.

38. That by reason of the premises, plaintiff Charles K. Barnum became entitled to receive from defendant for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to January 12, 1939, \$303.05, for the period from January 12, 1939 to October 24, 1939, \$955.71, for the period from October 24, 1939 to June 1, 1940, \$793.50, or a total of \$2,052.26, no part of which has been paid.

39. That by reason of the premises, defendant is liable to plaintiff Charles K. Barnum in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be [fol. 12] paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said Act.

Wherefore, plaintiff Charles K. Barnum demands judgment against defendant for the sum of \$4,104.52, plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff Teresa Flintoft, said plaintiff alleges:

40. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

41. That plaintiff Teresa Flintoft at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

42. That plaintiff Teresa Flintoft from October, 1938 to March 1, 1941 was employed by defendant at the regular rate of \$27.50 per week.

43. That at no time during said period did plaintiff Teresa Flintoft receive any pay or compensation for any overtime work, or any compensation above said regular salary.

44. That plaintiff Teresa Flintoft from October 24, 1938 to October 24, 1939 worked at least fourteen hours weekly over forty-four hours weekly, and became entitled to \$8.75 per week for such overtime work.

[fol. 13] 45. That plaintiff Teresa Flintoft from October 24, 1939 to March 1, 1940 worked at least sixteen hours weekly over forty-two hours weekly, and became entitled to \$10.48 per week for such overtime.

46. That plaintiff Teresa Flintoft from March 1, 1940 to October 24, 1940 worked at least twenty hours weekly over forty-two hours weekly and became entitled to \$13.10 per week for such overtime.

47. That plaintiff Teresa Flintoft from October 24, 1940 to March 1, 1941, worked at least twenty hours weekly over forty hours weekly and became entitled to \$13.80 per week for such overtime.

48. That, by reason of the premises, plaintiff Teresa Flintoft became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to October 24, 1939, \$455.00; for the period from October 24, 1939 to March 1, 1940, \$199.12; for the period from March 1, 1940 to October 24, 1940, \$301.30; for the period from October 24, 1940 to March 1, 1941, \$262.20; for a total of \$1,217.62, no part of which has been paid.

49. That, by reason of the premises, defendant is liable to plaintiff Teresa Flintoft in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

[fol. 14] Wherefore, plaintiff Teresa Flintoft demands judgment against defendant for the sum of \$2,435.24, plus

interest thereon, plus a reasonable attorney's fee to be fixed by the court and paid by the defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff Edward R. Salter, said plaintiff alleges:

50. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

51. That plaintiff Edward R. Salter at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

52. That from October 1938 to October 24, 1940, plaintiff Edward R. Salter was employed at the regular rate of \$37.50 per week.

53. That from December 21, 1940, to March, 1941, plaintiff Edward R. Salter was employed by defendant at the regular rate of \$30.00 per week.

54. That at ~~no~~ time during said periods did plaintiff Edward R. Salter receive any pay or compensation for any overtime work or any compensation above said regular salary.

55. That plaintiff Edward R. Salter from October 24, 1938 to October 24, 1939, worked at least twenty-six hours weekly over forty-four hours weekly and became entitled to \$33.28 weekly for such overtime work.

[fol. 15] 56. That Edward R. Salter from October 24, 1939 to October 24, 1940 worked at least twenty-eight hours weekly over forty-two hours weekly and became entitled to \$37.52 per week for such overtime work.

57. That plaintiff Edward R. Salter from December 21, 1940 to March 1, 1941 worked at least fourteen and one-half hours weekly over forty hours weekly and became entitled to \$16.39 per week for such overtime work.

58. That by reason of the premises, plaintiff Edward R. Salter became entitled to receive from defendant, for overtime pay the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939 \$1,730.86; for the period from October 24, 1939 to

October 24, 1940, \$1,951.04; for the period from December 21, 1940 to March 1, 1941, \$180.24; for a total of \$3,862.14, no part of which has been paid.

59. That by reason of the premises, defendant is liable to plaintiff Edward R. Salter in said amount plus the interest thereon and plus an additional sum equal to the total, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff Edward R. Salter demands judgment for the sum of \$7,724.28, plus interest, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

[fol. 16] And for a cause of action in favor of plaintiff Edward G. Tompkins, said plaintiff alleges:

60. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

61. That plaintiff Edward G. Tompkins at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

62. That from October 1938 to May 15, 1940 plaintiff Edward G. Tompkins was employed at the regular rate of \$40.00 per week.

63. That from May 15, 1940 to September 15, 1940 plaintiff Edward G. Tompkins was employed at the regular rate of \$35.00 per week.

64. That from September 15, 1940 to March 1, 1941 plaintiff Edward G. Tompkins was employed at the regular rate of \$35.00 per week.

65. That at no time during said period did plaintiff Edward G. Tompkins receive any pay or compensation for any overtime work or any compensation above said regular salary.

66. That plaintiff Edward G. Tompkins from October 24, 1938 to October 24, 1939 worked at least nine hours over

forty-four hours weekly and became entitled to \$12.24 per week for such overtime work.

67. That plaintiff Edward G. Tompkins from October 24, 1939 to May 15, 1940 worked at least eleven hours over [fol. 17] forty-two hours weekly and became entitled to \$15.75 per week for such overtime work.

68. That plaintiff Edward G. Tompkins from May 15, 1940 to September 15, 1940 worked at least eleven hours over forty-two hours weekly and became entitled to \$13.75 per week, for such overtime work.

69. That plaintiff Edward G. Tompkins from September 15, 1940 to October 24, 1940 worked at least eight hours over forty-two hours weekly and became entitled to \$10.00 per week for such overtime work.

70. That plaintiff Edward G. Tompkins from October 24, 1940 to March 1, 1941 worked at least eight hours over forty hours weekly and became entitled to \$10.56 per week for such overtime work.

71. That by reason of the premises, plaintiff Edward G. Tompkins became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939, \$636.48; for the period from October 24, 1939 to May 15, 1940 \$456.27; for the period from May 15, 1940 to September 15, 1940, \$247.50; for the period from September 15, 1940 to October 24, 1940 \$50.00; for the period from October 24, 1940 to March 1, 1941, \$200.54, for a total of \$1,590.79, no part of which has been paid.

72. That by reason of the premises, defendant is liable to plaintiff Edward G. Tompkins in said amount plus the [fol. 18] interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff Edward G. Tompkins demands judgment from defendant for the sum of \$3,081.58, plus interest thereon, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff Norton Mockridge, said plaintiff alleges:

73. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

74. That plaintiff Norton Mockridge at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

75. That from October 24, 1938 to March 1, 1941 plaintiff Norton Mockridge was employed by defendant at the following regular weekly rates from October 24, 1938 to August 21, 1939 at \$40.00 per week, from September 14, 1939 to September 15, 1940 at \$45.00 per week, from September 15, 1940 to November 20, 1940 at \$40.00 per weekly.

76. That at no time during the periods herein mentioned did plaintiff Norton Mockridge receive any pay or compensation for any overtime work.

[fol. 19] 77. That plaintiff Norton Mockridge from October 24, 1938 to August 21, 1939, and from September 14, 1939 to October 24, 1939, worked at least fifteen hours weekly over forty-four hours weekly, and became entitled to \$19.95 per week for such overtime work during the said period between October 24, 1938 to August 21, 1939 and said plaintiff between September 14, 1939 and October 24, 1939 worked at least fifteen hours weekly over forty-four hours weekly, and became entitled to \$23.10 per week for such overtime work during the said period between September 14, 1939 and October 24, 1939.

78. That plaintiff Norton Mockridge from October 24, 1939 to September 15, 1940 worked at least seventeen hours weekly over forty-two hours weekly, and became entitled to \$27.54 per week for such overtime work during said period and said plaintiff from September 15, 1940 to October 24, 1940 worked at least seventeen hours weekly over forty-two hours weekly, and became entitled to \$24.31 per week for such overtime work during said period between September 15, 1940 and October 24, 1940.

79. That plaintiff Norton Mockridge from October 24, 1940, to November 20, 1940 worked at least nineteen hours

weekly over forty hours weekly, and became entitled to \$28.50 per week for such overtime work.

80. That by reason of the premises, plaintiff Norton Mockridge, became entitled to receive from defendant for overtime pay, the following sums, together with interest [fol. 20] thereon: for the period from October 24, 1938 to August 21, 1939, \$857.85; for the period from September 14, 1939 to October 24, 1939, \$139.62; for the period from October 24, 1939 to September 15, 1940, \$1,294.38; for the period from September 15, 1940 to October 24, 1940; \$121.55; for the period from October 24, 1940 to November 20, 1940 \$114.00; for a total of \$2,527.43.

81. That by reason of the premises, defendant is liable to plaintiff Norton Mockridge in said amount plus the interest thereon and plus an additional sum equal to the total thereof, and plus a reasonable attorney's fee to be paid by the defendant besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore, plaintiff Norton Mockridge demands judgment of defendant in the sum of \$5,054.86 plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff John M. Page, said plaintiff alleges:

82. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

83. That plaintiff John M. Page at all times herein mentioned was employed by defendant in gathering news and rewriting same for the preparation and publication of said newspaper.

[fol. 21] 84. That from October 1938 to October 24, 1939 plaintiff John M. Page was employed by defendant at the regular rate of \$25.00 per week.

85. That from October 24, 1939 to September 5, 1940 plaintiff John M. Page was employed by defendant at the regular rate of \$27.50 per week.

86. That at no time during said periods did plaintiff John M. Page receive any pay or compensation for any

overtime work, or any compensation above said regular salary.

87. That plaintiff John M. Page was not employed pursuant to any agreement made by defendant with any representative as a result of collective bargaining.

88. That plaintiff, John M. Page from October 24, 1938 to October 24, 1939, worked at least thirteen and one-half hours weekly over forty-four hours weekly and John M. Page became entitled to \$11.61 weekly for such overtime work.

89. That plaintiff, John M. Page from October 24, 1939 to September 5, 1940 worked fifteen and one-half hours weekly over forty-two hours weekly and plaintiff John M. Page became entitled to \$14.85 per week for such overtime work.

90. That by reason of the premises, plaintiff John M. Page became entitled to receive from defendant, for overtime pay the following sums, together with interest thereon: for the period from October 24, 1938 to October 24, 1939 \$603.72; for the period from October 24, 1939 to September 5, 1940, \$668.25; for a total of \$1,271.97, no part of which has been paid.

91. That by reason of the premises, defendant is liable to plaintiff John M. Page in said amount plus the interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore, plaintiff John M. Page demands judgment against defendant for the sum of \$2,543.94, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff George Trow, said plaintiff alleges:

92. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

93. That plaintiff George Trow at all times herein mentioned was employed by defendant in gathering news for the preparation and publication of said newspaper.

94. That plaintiff George Trow, was employed by defendant at the following regular weekly rates from October 24, 1938 to about February 24, 1939 at the rate of \$17.50 per week, from about February 24, 1939 to about October 24, 1939 at the rate of \$20.00 per week, from about October [fol. 23] 24, 1939 to about October 24, 1940 at the rate of \$22.50 per week, from about October 24, 1940 to March 1, 1941 at the rate of \$25.00 per week.

95. That plaintiff George Trow, from October 24, 1938 to about February 24, 1939 worked at least seventeen and one-half hours weekly over forty hours weekly and became entitled to \$10.50 weekly for such overtime.

96. That plaintiff George Trow, from about February 24, 1939 to about October 24, 1939 worked at least seventeen and one-half hours weekly over forty-four hours weekly and became entitled to \$12.08 weekly for such overtime.

97. That plaintiff George Trow, from October 24, 1939 to about October 24, 1940 worked at least nineteen and one-half hours weekly over forty-two hours weekly and became entitled to \$15.80 weekly for such overtime.

98. That plaintiff George Trow, from about October 24, 1940 to March 1, 1941, worked at least twenty-one and one-half hours weekly over forty hours weekly and became entitled to \$22.36 weekly for such overtime.

99. That at no time during the periods herein mentioned did plaintiff George Trow receive any pay or compensation for any overtime work, or any compensation above said regular salary.

100. That by reason of the premises, plaintiff George Trow became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; for the period from October 24, 1938 to about [fol. 24] February 24, 1939, \$178.50; for the period from about February 24, 1939 to about October 24, 1939, \$422.80; for the period from about October 24, 1939 to about October 24, 1940, \$821.60; for the period from about October 24,

1940 to March 1, 1941, \$424.84; for a total of \$1,847.74, no part of which has been paid.

101. That by reason of the premises, defendant is liable to plaintiff George Trow in the said amount, plus the interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff George Trow demands judgment against defendant for the sum of \$3,695.48, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

And for a cause of action in favor of plaintiff William L. O'Donovan, said plaintiff alleges:

102. Repeats the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the complaint as though here set forth at length.

103. That plaintiff William L. O'Donovan at all times herein mentioned was employed by plaintiff in editing news and gathering news and in furthering various activities [fol. 25] fostered by defendant for the purpose of creating news and otherwise assisting in the publication of said newspaper.

104. That plaintiff William L. O'Donovan from October 24, 1938 to January 1, 1940 was employed by defendant at the regular weekly rate of \$105.48.

105. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1939 was employed by defendant at the regular weekly rate of \$113.46.

106. That plaintiff William L. O'Donovan from October 24, 1939 to January 1, 1940 was employed by defendant at the regular weekly rate of \$113.46.

107. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1940 was employed by defendant at the regular weekly rate of \$98.00.

108. That plaintiff William L. O'Donovan from October 24, 1940 to January 1, 1941 was employed by defendant at the regular weekly rate of \$98.00.

109. That at no time during the periods herein mentioned did plaintiff William L. O'Donovan receive any pay or compensation for any overtime work or any compensation above said regular salary.

110. That plaintiff from October 24, 1938 to January 1, 1939 worked at least ten hours over forty-four hours weekly and became entitled to \$36.00 per week for such overtime work.

[fol. 26] 111. That plaintiff William L. O'Donovan from January 1, 1939 to October 24, 1939 worked at least ten hours over forty-four hours weekly and became entitled to \$38.70 per week for such overtime work.

112. That plaintiff William L. O'Donovan from October 24, 1939 to January 1, 1940 worked at least ten hours over forty-two hours weekly and became entitled to \$40.50 per week for such overtime work.

113. That plaintiff William L. O'Donovan from January 1, 1940 to October 24, 1940 worked at least ten hours weekly over forty-two hours weekly and became entitled to \$35.00 per week for such overtime work.

114. That plaintiff William L. O'Donovan from October 24, 1940 to January 1, 1941 worked ten hours weekly over forty hours weekly, and became entitled to \$36.80 per week for such overtime work.

115. That by reason of the premises, plaintiff William L. O'Donovan became entitled to receive from defendant, for overtime pay, the following sums, together with interest thereon; from October 24, 1938 to January 1, 1939, \$360.00; from January 1, 1939 to October 24, 1939, \$1,625.40; from October 24, 1939 to January 1, 1940, \$405.00; from January 1, 1940 to October 24, 1940, \$1,470.00; from October 24, 1940 to January 1, 1941, \$368.00, for a total of \$4,228.40; no part of which has been paid.

116. That by reason of the premises, defendant is liable to plaintiff William L. O'Donovan in said amount plus the [fol. 27] interest thereon and plus an additional sum equal to the total thereof; and plus a reasonable attorney's fee to be paid by the defendant, besides the costs and disbursements of this action, all pursuant to the provisions of said act.

Wherefore plaintiff William L. O'Donovan demands judgment against defendant for the sum of \$8,456.80, plus a reasonable attorney's fee to be fixed by the Court and paid by defendant, together with the costs and disbursements of this action.

Wherefore, plaintiffs demand judgment as follows:

(a) In favor of plaintiff Courtney M. Mabee for the sum of \$9,136.24, plus interest thereon, plus an additional sum to be fixed by the court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(b) In favor of plaintiff Charles K. Barnum for the sum of \$4,104.52, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(c) In favor of plaintiff Teresa Flintoft, for the sum of \$2,435.24, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

[fol. 28] (d) In favor of plaintiff Edward R. Salter, for the sum of \$7,724.28, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(e) In favor of plaintiff Edward G. Tompkins, for the sum of \$3,081.58, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(f) In favor of plaintiff Norton Mockridge, for the sum of \$5,054.86 plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(g) In favor of plaintiff John M. Page, for the sum of \$2,543.94, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and

to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(h) In favor of plaintiff George S. Trow, for the sum of \$3,695.48, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

(i) In favor of plaintiff William L. O'Donovan for the sum of \$8,456.80, plus interest thereon, plus an additional sum to be fixed by the Court as a reasonable attorney's [fol. 29] fee and to be paid by defendant to plaintiff, together with the costs and disbursements of this action.

Stephen R. J. Roach, Attorney for Plaintiffs, 175 Main Street, White Plains, N. Y.

IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

[Same Title].

ANSWER

The defendant, by Marlatt & Brooks, its attorneys, answering the alleged cause of action in favor of Courtney M. Mabee set forth in plaintiffs' amended complaint herein:

1. Denies the jurisdiction of this Court as alleged in paragraph 2.
2. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of paragraph 6.
3. Denies the allegations of paragraphs 4, 5, 7, 8, 9, 10, 14, 15, 16 and 17.
4. Denies the allegations of paragraphs 21, 23, 24, 25, 26, 27 and 28.

[fol. 30] The defendant answering the alleged cause of action in favor of Charles K. Barnum set forth in plaintiffs' amended complaint herein:

5. Answering paragraph 29 repeats the denials contained in paragraphs 1, 2 and 3 herein.
6. Denies the allegations of paragraphs 35, 36, 37, 38 and 39.

The defendant answering the alleged cause of action in favor of Teresa Flintoft set forth in plaintiffs' amended complaint herein:

7. Answering paragraph 40 repeats the denials contained in paragraphs 1, 2 and 3 herein.

8. Denies the allegations of paragraphs 44, 45, 46, 47, 48 and 49.

The defendant answering the alleged cause of action in favor of Edward R. Salter set forth in plaintiffs' amended complaint herein:

9. Answering paragraph 50 repeats the denials contained in paragraphs 1, 2 and 3 herein.

10. Denies the allegations of paragraphs 52, 55, 56, 57, 58 and 59.

[fol. 31] The defendant answering the alleged cause of action in favor of Edward G. Tompkins set forth in plaintiffs' amended complaint herein:

11. Answering paragraph 60 repeats the denials contained in paragraphs 1, 2 and 3 herein.

12. Denies the allegations of paragraphs 62, 63, 64, 66, 67, 68, 69, 70, 71 and 72.

The defendant answering the alleged cause of action in favor of Norton Mockridge set forth in plaintiffs' amended complaint herein:

13. Answering paragraph 73 repeats the denials contained in paragraphs 1, 2 and 3 herein.

14. Denies the allegations of paragraphs 75, 77, 78, 79, 80 and 81.

The defendant answering the alleged cause of action in favor of John M. Page set forth in plaintiffs' amended complaint herein:

15. Answering paragraph 82 repeats the denials contained in paragraphs 1, 2 and 3 herein.

16. Denies the allegations of paragraphs 84, 85, 88, 89, 90 and 91.

[fol. 32] The defendant answering the alleged cause of action in favor of George S. Trow set forth in plaintiffs' amended complaint herein:

17. Answering paragraph 92 repeats the denials contained in paragraphs 1, 2 and 3 herein.

18. Denies the allegations of paragraphs 94, 95, 96, 97, 98, 100 and 101.

The defendant answering the alleged cause of action in favor of William L. O'Donovan set forth in plaintiffs' amended complaint herein:

19. Answering paragraph 102 repeats the denials contained in paragraphs 1, 2 and 3 herein.

20. Denies the allegations of paragraphs 104, 105, 106, 107, 108, 110, 111, 112, 113, 114, 115 and 116.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a first separate defense thereto alleges:

21. That this Court has no jurisdiction over the subject-matter of the causes of action for the reasons that:

(a) The Fair Labor Standards Act under which the claims against defendant set forth in the complaint are alleged to have arisen is not a statute which can be applied to the business of defendant by reason of the commerce [fol. 33] clause (Article I, Section 8) of the Constitution of the United States.

(b) The aforesaid Act, if applied to the defendant, would violate its rights as guaranteed by the First Amendment to the Constitution of the United States.

(c) The aforesaid Act, if applied to the defendant, would violate its rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a second separate defense thereto alleges:

22. That the Fair Labor Standards Act is unconstitutional in so far as it applies to daily newspapers in that it violates

the rights guaranteed by the First and Fifth Amendments to the Constitution of the United States and Article I, Section 8 of the Constitution of the United States, and more particularly because it attempts to classify newspapers on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt thousands of newspapers from the burdens of the Act while subjecting all others engaged in the same business to those burdens.

[fol. 34] The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a third separate defense alleges:

23. That each of the plaintiffs Courtney M. Mabee, Charles K. Barnum, Teresa Flintoft, Edward R. Salter, Edward G. Tompkins, Norton Mockridge, John M. Page, George S. Trow, William L. O'Donovan were at all times named in the complaint employed in a bona fide professional capacity and therefore exempt from the application of the provisions of Sections 6 and 7 of the Act herein by reason of the provisions of Section 13(a) (1) thereof; that plaintiff O'Donovan was at all times named in the complaint employed in a bona fide executive capacity and therefore exempt from the application of the provisions of Sections 6 and 7 of this Act herein by reason of the provisions of Section 13 (a) (1) thereof.

24. That the plaintiffs Courtney M. Mabee, Charles K. Barnum, Edward R. Salter, Edward G. Tompkins, Norton Mockridge, John M. Page, George S. Trow were at all times named in the complaint employed by the defendant in the gathering and writing of news reports; that such work is essentially professional in character.

25. That the plaintiff O'Donovan was at all times named in the complaint employed by the defendant as City Editor; that such work is both executive and professional in character.

26. That the plaintiff Flintoft was at all times named in [fol. 35] the complaint employed by the defendant as Society Editor; that such work is essentially professional in character.

The defendant further answering each and every alleged cause of action in the plaintiffs' amended complaint herein and as a fourth separate defense alleges:

27. That the business of the defendant in common with all newspapers is the rendering of a service to its readers through the dissemination of information in the printed form; that the provisions of Sections 6 and 7 of the Act herein do not apply to any of the plaintiffs herein since they were at all times named in the complaint employees engaged in a service establishment the greater part of whose servicing was at all times in intrastate commerce within the provisions of Section 13 (a) (2) of the Act herein.

Wherefore, the defendant demands judgment against the plaintiffs and each of them dismissing the amended complaint together with the costs of this action.

Marlatt & Brooks, Attorneys for Defendant, Office & P. O. Address, 11 West Prospect Avenue, Mount Vernon, New York.

(Verified by William L. Fanning, December 9, 1942.)

[fol. 36] IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

[Same Title]

ORDER FOR JUDGMENT—May 26, 1943

This action having regularly come on for trial at Trial Term, Part II of this Court, and same having been duly tried by the Court, Honorable Alonzo G. Hinkley presiding, and the proofs of the parties having been heard and the Court having found in favor of the plaintiffs, on the opinion and decision of the Court dated April 27, 1943, and sufficient reason appearing therefor, it is

Ordered that plaintiff, Courtney M. Mabee, have judgment against the defendant, White Plains Publishing Company, Inc., for the sum of \$5,264.97, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938; that

Plaintiff, Charles K. Barnum, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$958.63, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, Edward G. Tompkins, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$1,363.85, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also additional equal amount as liquidated damages; that

Plaintiff, Norton Mockridge, have judgment against defendant, [fol. 37] White Plains Publishing Company, Inc., for the sum of \$2,928.83, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, George S. Trow, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$1,544.26, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; that

Plaintiff, William L. O'Donovan, have judgment against defendant, White Plains Publishing Company, Inc., for the sum of \$4,858.79, plus interest thereon pursuant to Section 480 of the Civil Practice Act, and also an additional equal amount as liquidated damages; and it is further

Ordered that all the plaintiffs above named have judgment against defendant for the sum of \$1,000.00 hereby fixed by the Court as a reasonable attorney's fee to be paid to plaintiffs by defendant pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, plus the taxable costs and disbursements of this action.

The clerk of this Court is hereby directed to enter judgment accordingly.

May 26, 1943.

Enter,

Alonzo G. Hinkley, Justice of the Supreme Court.

[fol. 38] IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

[Same Title]

JUDGMENT—June 2, 1943

This action having regularly come on for trial at Trial Term, Part II of this Court, and same having been duly tried by the Court, Honorable Alonzo G. Hinkley presiding, and the proofs of the parties having been heard and the Court having found in favor of the plaintiffs, on the opinion and decision of the Court dated April 27, 1943, and on the order of Mr. Justice Hinkley, dated May 26, 1943, directing the entry of judgment, and sufficient reason appearing therefor, it is

Adjudged, that plaintiff Courtney M. Mabee, recover from defendant, White Plains Publishing Company, Inc., the total sum of twelve thousand six hundred thirty-six dollars forty-eight cents (\$12,636.48) which total sum is made up as follows: \$5,264.97, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$1,014.42, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$6,279.39 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$38.85, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff Charles K. Barnum recover from [fol. 39] defendant, White Plains Publishing Company, Inc., the total sum of two thousand three hundred seventy-one dollars and four cents (\$2,371.04) which total sum is made up as follows: \$958.63, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$219.60, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,178.23 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$7.29, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged that plaintiff Edward G. Tompkins recover from defendant, White Plains Publishing Company, Inc., the

total sum of three thousand two hundred fifty-seven dollars and seventy-four cents (\$3,257.74) which total sum is made up as follows; \$1,363.85, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$255.01, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,618.86 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$9.99, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff Norton Mockridge recover from defendant, White Plains Publishing Company, Inc., the total sum of seven thousand one hundred seventy-three [fol. 40] dollars and seventy-four cents (\$7,173.74) which total sum is made up as follows: \$2,928.83, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$636.08, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$3,564.91 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$21.96, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff George S. Trow recover from defendant, White Plains Publishing Company, Inc., the total sum of three thousand seven hundred nine dollars and ninety-two cents (\$3,709.92) which total sum is made up as follows; \$1,544.26, plus interest thereon pursuant to Section 480 of the Civil Practice Act to the date of said decision, viz., April 27, 1943, which interest amounts to \$299.32, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$1,843.58 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$11.38, and also an additional equal amount as liquidated damages pursuant to Section 16(b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that plaintiff William L. O'Donovan recover from defendant, White Plains Publishing Company, Inc., the total sum of eleven thousand eight hundred thirty-four dollars and seventy-two cents (\$11,834.72) which total [fol. 41] sum is made up as follows, \$4,858.79, plus interest thereon pursuant to Section 480 of the Civil Practice Act to

the date of said decision, viz., April 27, 1943, which interest amounts to \$1,022.30, plus the interest, also pursuant to Section 480 of the Civil Practice Act, on \$5,881.09 from the date of said decision, viz., April 27, 1943, to the date of entry of this judgment, which interest amounts to \$38.27, and also an additional equal amount as liquidated damages pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and it is

Adjudged, that all plaintiffs, viz., Courtney M. Mabee, residing at 86 Grove Street, Stamford, Connecticut, Charles K. Barnum, residing at 43 Weskora Ave., Pleasantville, N. Y., Edward G. Tompkins, residing at Saxon Gardens Apartments, White Plains, New York, Norton Mockridge, residing at Camp Upton, New York, George S. Trow, residing at 704 Steamboat Road, Stamford, Connecticut, and William L. O'Donovan, residing at 99 Harvard Drive, Hartsdale, New York, recover from the defendant, White Plains Publishing Company, Inc., residing at 76 Grand Street, White Plains, New York, the sum of \$1,126.70 made up as follows; one thousand dollars (\$1,000.00) fixed by the Court as a reasonable attorney's fee to be paid to plaintiffs by defendant pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, and \$126.70, the costs and disbursements of this action.

Dated: June 2, 1943.

Harold Mercer, Clerk.

[fol. 42] IN SUPREME COURT OF NEW YORK, COUNTY OF
WESTCHESTER

Trial Term, Part V

COURTNEY M. MABEE, CHARLES K. BARNUM, TERESA FLINTOFT, Edward R. Salter, Edward G. Tompkins, Norton Mockridge, John M. Page, George S. Trow and William L. O'Donovan, Plaintiffs,

vs.

WHITE PLAINS PUBLISHING COMPANY, Inc., Defendant

Case

White Plains, N. Y.,
February 15, 1943; 12:40 P. M.

Before Hon. Alonzo G. Hinkley, Judge

APPEARANCES:

Stephen R. J. Roach, Esq., 175 Main Street, White Plains, N. Y., Attorney for Plaintiffs.

Marlatt & Brooks, 11 W. Prospect Avenue, Mount Vernon, N. Y., Attorneys for Defendant; by Elisha Hanson, Esq., 729 15th Street, N. W., Washington, D. C., and Miss [fols. 43-45] Frances K. Marlatt, 11 W. Prospect Avenue, Mount Vernon, N. Y., of Counsel.

(Mr. Roach opened the case to the Court on behalf of the plaintiffs.)

COURTNEY M. MABEE, one of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. Mabee, you are one of the plaintiffs in this lawsuit?

A. I am.

Q. And you were formerly employed by the defendant, the White Plains Publishing Company, Incorporated?

A. I was.

Q. And that company published a newspaper known as the Daily Reporter in the City of White Plains; is that correct?

A. It is.

Q. And it gave up the publication of the paper on March 1, 1941?

A. The last issue was February 28, 1941.

Q. At that time were you in the employ of the publishing company?

A. I was.

Q. How long had you been in the employ of the defendant publishing company up to the time of February 28, 1941?

A. I had been employed on a salary for 14 years.

Q. Were you employed continually by the company between October 24, 1938, and March 1, 1941?

A. I was.

Q. On October 24, 1938, that is the date the Act that we are concerned with became effective, what was your salary?

A. \$52.50 per week.

Q. Were you paid weekly?

A. Paid weekly.

[fol. 46] Q. This teletype machine was a machine that brought in news from some press service?

A. That is right. We had two at different periods.

Q. What time of the morning did that machine start up?

A. The machine started, I believe, at 6 o'clock. I cannot answer definitely because I was not there till 8.

Q. Is that the time it was supposed to start?

A. It was supposed to start at 6.

Q. How many persons did you have employed in the news room?

A. The number varied, but for the greater part of the time the number was nine.

Q. You say that during the afternoon you prepared copy for the next day's edition?

A. For the next day and for succeeding days.

Q. Yes. In your composing room how many shifts did you have?

A. They had two. They had two, a day side and a night side.

Q. What was that?

A. A day side and a night side.

Q. With respect to your news room, how many shifts did you have?

A. One, with the one exception of a sports man who worked for a period at night.

Q. With that one exception you only had the day shift in the news room, then?

A. That is right.

Q. And you had men in the composing room during the night?

A. That is right.

Q. Do you remember how many?

A. I believe—

[fol. 47] Mr. Hanson: I object to that as it is not even a part of the case, your Honor.

The Court: I do not know how that would be material from what little I understand.

Q. The idea I was driving at is this: In the afternoon you had to get together certain copy for the composing room and the composing room had men working at night. Is that the fact?

A. That is right.

Q. What time did the day shift of the composing room start?

A. They started, I believe, at 7 in the morning.

Mr. Hanson: I still object, if your Honor please, to anything except what this man here himself did.

He makes a claim for overtime, and the sole question, in so far as he is concerned on his time, is what hours he put in.

The Court: Objection overruled. I think I will take that. It may have some material bearing upon this theory which he has. There is no jury here.

Q. You say the day shift of the composing room started at 7 o'clock A. M.?

A. At 7 A. M.

Q. And your day's work started at what time?

A. At 8.

Q. And the material that the composing room men used was the material that you had gotten together on the previous afternoon; is that the idea?

A. That is right.

Q. During that period, from October 24, 1938, until March 1, 1941, did the Daily Reporter print national and international news?

A. Yes, it did.

[fol. 48] Q. And that news was received from what sources?

A. It came in from various sources. Some of it from the mail. Some of it came over the Associated Press wires; some over the International News Service wires.

Q. And when you say over the International News Service wires, is that connected up with that ticker which you mentioned?

A. Yes.

Q. Teletype?

A. Yes.

Q. Is that what you call it?

A. Yes.

Q. During that period did the Daily Reporter have national advertising in its newspaper?

A. It did.

Q. All during that period?

A. All during that period.

Q. And the paper that was used in making up the paper itself, that came from where?

A. It came from Maine.

Q. And the advertising mats that were used by the paper, those came from where?

A. Largely from Meyer-Both in Chicago.

The Court: What do you call it?

The Witness: Meyer-Both.

The Court: What are you asking about?

Mr. Roach: The advertising mats, your Honor.

Q. There were cuts that were used to reproduce pictures?

A. That is right.

Q. They came from where?

A. Many of them from Basil Smith Company, Philadelphia.

Q. Pennsylvania?

A. Pennsylvania, yes, sir.

Q. Between those dates, namely, October 24, 1938, and October—and March 1, 1941, did the Daily Reporter have circulation outside of the State of New York?

A. It did.

[fol. 49] Q. And during all of that period?

A. During all of that period.

Q. Did the Reporter during all that period have service with respect to features of one kind or another?

A. It did.

Q. What type of features?

A. Comic strips. We had a syndicated news, medical news column, and other cartoons—not cartoons, but panels; and I think that covered the range of the features.

Q. Where did these services come from?

A. Some came from Chicago. Many—some came from as far away as California.

Q. Did you have a pictorial service?

A. We had.

Q. During that period?

A. We did.

Q. That pictorial service came from where?

A. It came from Chicago, Central Press Association.

Q. What did you say your salary was in October of 1938?

A. \$52.50 per week.

Q. How long did that salary of \$52.50 a week remain?

A. Until May 8, 1940.

Q. So that for the period of the first year after the Act of 1938, namely, between October 24, 1938, and October 24, 1939, your salary was the same, \$52.50 per week?

A. That is correct.

Q. Now, in addition to the hours you have already testified to, Mr. Mabee, did you, during that period, namely, between October 24, 1938, and October 24, 1939, put in extra time in connection with your duties and work with the Daily Reporter?

A. Yes, I did.

Q. Did you have any Sunday work?

A. Yes, I did.

Q. What was the nature of the Sunday work you had?

[fol. 50-62] A. The Sunday work was the preparing of copy to be used in the Monday paper. That meant the complete roundup of news for Saturday and Saturday afternoon and Saturday night and Sunday had to be prepared on Sunday so that the linotype machines in the composing room would have it in at 7 o'clock Monday morning.

[fol. 63] Cross-examination.

By Mr. Hanson:

Q. Mr. Mabee, you did not have a direct wire from the Associated Press in your office at any time, did you?

A. No. We had a tie-up wire with the County News Bureau.

Q. The County News Bureau is entirely local here in Westchester County, is it not?

A. As far as I know.

Q. Yes. So far as anything that came to you from the Associated Press, it was relayed to you through the wires of the County News Bureau?

A. That I cannot answer for.

Q. Did you handle the mail room circulation of this newspaper?

A. No.

Q. Did you know of your own knowledge when you were testifying, anything about the circulation of the newspaper outside of the State of New York?

A. Yes, I did.

Q. Where did you get that information?

A. From the mailing list.

Q. Where did you get the mailing list?

A. They were at the office at all times.

Q. And when did you look over those mailing lists to determine that?

A. I have looked at them many times.

Q. About how many subscriptions did the White Plains Reporter have in 1938, if you recall?

[fol. 64] Mr. Roach: For the purpose of the record, your Honor, I object to that on the ground that the decisions seem to be harmonious and also the interpretative bulletins seem to be harmonious to the point that the amount of out-of-state circulation is not material. It is the fact of the out-of-state circulation that controls.

The Court: Objection overruled. I will take it.

Q. Do you recall what the circulation of the White Plains Reporter was during the year 1938?

A. During the year 1938?

Q. Yes.

A. The circulation of the White Plains Reporter?

Q. Yes.

A. According to their own figures?

Q. Yes.

A. I cannot guarantee the accuracy of those figures, but according to their own figures in that year, there were 11,000.

Q. Where did you get those figures?

A. What is that?

Q. Where did you get that information?

A. From Mr. Hogan and Mr. Tuller who told us that.

Q. Do you know how much of that went out of the State of New York, if any?

A. I know that some of it went out of the State of New York.

Q. How much?

A. The amount, as I understand it from their records, showed 45 copies.

Q. Out of about 11,000?

A. That is right.

Q. Going out of the State of New York?

A. Yes.

Q. For 1939, would you say the same—give me the information for 1939, the circulation and the number that went out of New York.

A. I am going again by entirely what they said. I [fol. 65] have no means of checking the actual number of copies.

Q. You did not mean then that anything went out of the State of New York?

A. Oh, yes, I do, very definitely.

Q. How do you know?

A. Because friends of mine from as far away as India received copies.

Q. How do you know that?

A. Because they told me.

Q. It is pure hearsay then?

A. No.

Q. You did not mail them to your friends in India, did you?

A. On several occasions, as a matter of fact, I did.

Q. But they did not subscribe to them through you?

A. No, they did not.

Q. You were sending them something; isn't that correct?

A. That is true.

Q. All right. In 1939, from the best of your information, what do you know the circulation to have been?

A. The total circulation of the paper?

Q. Yes.

A. According, again, I was told by Mr. Hogan and Mr. Tuller the circulation at that time was 9,500.

Q. What was the occasion of their telling you that?

A. They told us that to go out and spread the word among the advertisers in the City of White Plains and throughout Westchester County, because of the fact there was an opposition newspaper about to start or had already started.

Q. Do you recall how many of those papers in 1939 went outside of the State of New York?

A. I think the number was practically the same.

Q. That is about 45?

A. About 45.

Q. Out of 9,500?

A. That is right.

[fols. 66-69] Q: What do you know for 1940?

A. The same situation prevailed.

Q. And up until the time of the suspension on February 28, 1941?

A. That is right.

Q. So you would say they had about 9,000 through 1940, and at the date of the suspension about 45 copies going outside of the state?

A. I would say that is what I was told by executives of the corporation.

Q. You also mentioned advertising? Did you sell advertising?

A. I did.

Q. In the newspaper?

A. I did.

Q. You did?

A. I did.

Q. To whom did you sell it?

A. I sold advertising to August Huszar of the Log Cabin, Armonk; to Paul Stapelfeld of the Bavarian Gardens in Scarsdale; to William Reiber at Rhineland Gardens, Armonk; Ed Van Buskirk at Moreland Farm in Mt. Kisco. I sold it also to the Crow's Nest Restaurant in Greenwich, Connecticut, and to Leighton's Half-Way House in Greenwich, Connecticut, and to the Palisades Amusement Park in New Jersey.

I think that will cover it.

Q. And all through this period was that?

A. At various times during that period.

Q. About how much of that time did you devote to selling advertising?

A. My time devoted to selling advertising was separate from anything I did for the News Department and from anything I made a claim for.

Q. Even so, you are offering exhibits here to show the time you put in at work. Do these exhibits contain the time you spent selling advertising?

A. They do not.

Q. They do not?

A. No.

[fol. 70] Q. Is it not?

A. That is true.

Q. Yes. Now, then, you stated that you know that this newspaper company, the defendant herein, bought its newsprint from Maine. How did you know that?

A. From two executives of the corporation, Mr. Keefe, who was our business manager; Mr. Tuller, who was the publisher of the paper.

Q. How did you happen to get that information from them? Did you go in and ask them?

A. I asked Mr. Tuller. Mr. Keefe volunteered the information.

Q. In anticipation of this suit?

A. Oh, Lord, no. This was long, long before this suit was ever thought of.

Q. What was the occasion of asking where the newsprint paper came from?

A. I believe I asked them because somebody else asked me.

Q. Just curiosity?

A. They wanted to find out where it was coming in so that they could bid on it.

Q. How did you happen to know that advertising mats came in from Meyer-Both?

A. Because they came in big envelopes and very often were delivered to the newsroom rather than the Advertising Department.

Q. What is a mat? Will you explain just exactly what it is?

A. Yes. A mat is a piece of asbestos on which an impression of type has been made.

Q. Now, that mat cannot be used directly in the production of a newspaper without going through a further process; can it?

A. That is right.

Q. In the office?

A. That is right.

Q. Will you describe that process?

[fol. 71] A. That process consists of taking the mat, heating it, filling in the back of it with backing so that there will be no high spots showing on the finished product; making a metal cast of that mat, and in our particular instance we had to make a second mat. Then a cylindrical press which is put on the press and does the actual printing.

Q. In other words, you first take a flat mat that shows the page form?

A. That is right.

Q. And you make another cast of that which is a cylindrical cast, as you described?

A. Right.

Q. That goes on the press?

A. That is right.

Q. Then your paper is already on the press, is it not?

A. Yes.

Q. And your ink is there and when you start it going, why, there is the impression of the cylinder on the paper that transposes the ink thereon and brings out your printing.

A. Does the actual printing, yes.

Q. So that there are several steps between the receipt of the Meyer-Both mat and the production of the newspaper which uses it?

A. That is true.

Q. Wouldn't you say the same thing was true of the features which came in to the newspaper from outside of New York State in mat form?

A. If they came in mat form.

Q. All right. Let us assume they do not come in mat form. What happens to them? Let us say they come in, for instance, printed.

A. If they come in printed from other companies, they are handled the same as any other copy that is brought in to the newspaper.

Q. Just as news copy?

[fol. 72] A. That could be through the city desk and the additions, if any, subtractions, if any, corrections, if any, changes in punctuation, corrections in punctuation are made at the city desk, and the copy is then turned over to the composing room where it is placed on the Linotype machine, and the operator on the Linotype machine, through a mechanical device at his command, sets a line of type corresponding to the type on the copy before him. That line of type is placed in a chase.

Q. In a what?

A. You better make it a form, and the lines of type are placed around the existing advertising for that page or the space allotted for the advertising for the page.

The form is then locked up by having the chase tightened to hold the type in its place; and from that form a mat is rolled by a hydraulic rolling machine which makes an impression on that page upon the asbestos mat. This asbestos mat is taken to the pressroom where it is heated and shaped into a cylinder. The metal casting was made of that cylinder. This metal casting was placed upon the press and did the actual printing.

Q. All right. Now, then, if you get pictures they came, they usually came in mat form, did they not?

A. Oh, no, no.

Q. Did you make your own reproduction of those photographs?

A. We made some.

Q. Yes.

A. The majority of them were made by Basil-Smith in Philadelphia.

Q. Those Basil-Smith pictures which you saw when they came in, they had to go through the same process of having a mat made from them, did they not?

A. That is true.

[fol. 73] Q. Being placed on a form and then having your cylinder made and a cylinder cast to go on the press?

A. Yes, that is true.

Q. Do you know of anything that came in that office that went out in just exactly the form that it came in

without going through this process of editing, of correction, of shortening or something in the composing room, the teletyping room or the pressroom?

A. Well, on stereotyped newspaper it has to be changed.

Q. What is that?

A. I said on a stereotyped newspaper you must make changes.

Q. What kind of newspaper is that? Is that what kind of newspaper you had?

A. That is true. It is mechanically impossible to do it otherwise.

Q. In your News Department you were speaking of taking those reports off the ticker?

A. That is right.

Q. Did you use all of the information that came in on the ticker?

A. No, we did not.

Q. Was it not a fact, Mr. Mabee, that your paper used very little of that information between 1938 and 1939?

A. During 1938 and 1939 we used as much as we did later.

Q. Your paper largely concentrated on the local news?

A. That is true.

Q. In White Plains?

A. That is quite true.

Q. But whether the material came in from the County News Service or by the INS wire or from your own reporters, it went over the copy desk?

A. That is right.

Q. Then this man on the copy desk, either of his own volition or by instruction of someone or other, selected that material and edited it to suit the purposes of the paper?

A. That is right.

[fols. 74-106] Q. And in many cases he discarded most of what came over his desk, did he not?

A. I won't say in many cases.

Q. Well, take your Associated Press dispatches. Most of those went into the waste basket?

A. Yes. I grant you that the majority of them did.

Q. Take the International News Service.

A. Not as much on International News Service as on Associated Press.

Q. Not as much as that?

A. No.

Q. How about the County News Service?
 A. The County News Service was used to a great extent.
 Q. That was used to a great extent?
 A. That is true.
 Q. All right. But then after that was edited on the desk and in the process of editing you wrote heads for it?
 A. That is right.
 Q. For that material?
 A. Yes.
 Q. And you wrote subheads?
 A. Yes.
 Q. After that it had to go to the composing room, did it not?
 A. That is true.
 Q. When it got to the composing room it was first set in type?
 A. True.
 Q. Then put in the page form?
 A. True.
 Q. Then it went in to have a mat made of that form?
 A. That is true.
 Q. And then had another mat made?
 A. No.
 Q. What happened then?
 A. One mat was made from your form.
 Q. One mat from your form?
 A. Yes.
 Q. And then a cylinder?
 A. And a cylinder cast.
 Q. And then you made your cylinder from the mat and then put the mat on and started to go to work?
 A. That is true.

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[fol. 107] NORTON MOCKRIDGE, one of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Private Mockridge, you are stationed at Camp Upton?
 A. That is right.
 Q. With the United States Army?
 A. That is right.

Q. In what department?

A. The Military Intelligence and Internal Security Section.

Q. And in October, 1938, were you in the employ of the defendant, the White Plains Publishing Company?

A. I was.

Q. Publisher of the White Plains Daily Reporter?

A. I was.

Q. And how long did you continue in that employ of that company?

A. Until November 12, 1940.

Q. How long had you been with the Daily Reporter at the time you became disassociated with it?

[fols. 108-141] A. Since the early part of 1936. I think it was February.

Q. 1936?

A. Yes.

Q. Now, in October, 1938, what were your duties?

A. In October of 1938?

Q. Yes.

A. I was a reporter on this newspaper. In addition to general news assignments, general reporting, general rewrite, I handled theatricals, amusements, and I would say that I worked on special features.

I handled various promotions that the paper itself had. Do you want me to go specifically into going out and covering meetings of general sorts?

Q. No. I just want a general outline.

A. General promotion, general reporting and general theatricals.

Q. What time did you start your work in the morning?

A. 8 o'clock.

Q. And you worked until how late?

A. 6 o'clock at night.

Q. That was Monday through Friday?

A. Monday through Friday, and on Saturdays from 8 until 1:00 A. M.—1:00 P. M.; pardon me.

Q. And Monday through Friday did you take time out for lunch?

A. I took at least half an hour, and I had as much as an hour.

Q. Did you ever take over an hour for lunch?

A. Never more than an hour.

Q. Anywheres from a half an hour to an hour?

A. Yes, and in my case where we were rather rushed I did not go out for lunch at all. I had lunch brought in.

Q. With respect to the period from October 24, 1938, until January 1, 1939, did you do any work beyond the hours which you have just mentioned?

A. Yes, I did.

[fol. 142] Recross-examination by Mr. Hanson:

Q. Just why would it be impossible, Mr. Mockridge, to give accurate hours spent at those meetings?

A. Because I have never punched a time clock.

Q. You have never punched a time clock?

A. I never watched the clock.

Q. In other words, you never kept any record of the time you put in while you were employed, did you?

A. No.

Q. You never made any claim for overtime, did you?

A. I did not know I could.

Q. The answer is "No," isn't it?

A. No.

Q. And you never made any claim for overtime until you filed this suit, did you?

A. Yes.

Q. When?

A. I went to the Wage and Hours people soon after I was fired, and spoke to them about it. They suggested I start suit then.

Q. I still ask you did you ever make any claim on your employer directly?

A. No.

Q. At any time until you filed this suit?

A. For what?

Q. For overtime.

A. No. I asked for more money.

Q. Well, I mean for overtime under this Act, if it applies to this employer.

A. No.

Q. To this defendant?

A. No, not for overtime as such.

Q. In your bill of complaint here how do you reach the estimate of overtime which you allege in there?

A. I estimated the minimum number of hours I worked on these assignments, and turned them over to Mr. Roach and he computed it.

Q. Did you ever check what you allege in that complaint [fols. 143-160] as to the minimum number of hours overtime week by week?

A. I do not recall exactly what it is.

[fol. 161] CHARLES K. BARNUM, one of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. Barnum, where do you reside?

A. At 43 West Cora Avenue, Pleasantville, New York.

Q. In October, 1938, were you in the employ of the White Plains Publishing Company, Incorporated, publisher of the White Plains Daily Reporter?

A. Yes.

[fol. 162] Q. Had you been in its employ prior to that time, and if so, for how long?

A. I believe since July, 1937.

Q. In October of 1938 what were your duties, generally speaking?

A. Pardon me. What was that?

Q. What were your duties, generally speaking, in October of 1938?

A. That of assistant sports editor, which required assisting the editor in all the duties of the sports desk of the paper.

Q. What time of the day did you start your work?

A. Before 7 o'clock in the morning.

Q. You were there before some of the other newsmen?

A. Yes.

Q. Was there some reason why you, assistant sports man, got there before the other newsmen?

A. Yes. The reason was that the sports pages were cleared out earlier than the rest of the newspaper.

Q. When you got there in the morning was it you who started the ticker that we have heard about before in this lawsuit?

A. Yes.

Q. What type of news generally came over the teletype first?

A. Generally it was sports news and early general news. The news was alternated on the ticker.

Q. Until the other newsmen got there did you handle the teletype machine?

A. I handled it to the extent of taking the copy off the machine, and taking from that copy what I needed.

Q. How late would you work in the day, that is, your regular day?

A. Until after 4 o'clock in the afternoon.

Q. Did you have some time off for lunch?

A. I generally took half an hour.

[fols. 163-212] Q. Did you on occasions work beyond 4:00 P. M. in the afternoon?

A. Frequently.

Q. What about Saturdays?

A. I worked Saturdays. May I refer to the memo I made?

Mr. Hanson: Wait a minute. What is the memorandum you are reading from?

The Witness: I noted down the hours that I spent in the office, because when I changed my position with the paper later those hours changed, and I wanted to be sure not to make any mistakes or get any confusion.

Q. When did you do that, Mr. Barnum, if I may ask?

A. Prepare this?

Mr. Hanson: Yes.

The Witness: Several days ago. Sometime last week.

Mr. Hanson: Does it come from any records that you had prepared previously or just out of your head?

The Witness: I verified it with information I had given Mr. Roach.

Mr. Hanson: Well now, wait a minute. I am asking you the question whether it came from any records that you had previously prepared or something else. Where did you get the information on which you based that?

The Witness: This is my recollection.

Mr. Hanson: That is from your recollection?

The Witness: Yes.

Mr. Hanson: What is the information you previously gave Mr. Roach with which you verified this?

The Witness: That was information I prepared too from my recollection.

[fol. 213] Recross-examination.

By Mr. Hanson:

Q. When you went through these books, getting back to them again, you did not check the number of dates on which your page appeared, did you?

A. No.

Q. Now, at these wrestling matches and boxing matches, was your story about the crowd or was your story about the match that took place, if you did the writing?

A. Generally it was about the match and sometimes on the crowd.

Q. All of your work was done, was it not, Mr. Barnum, to convey information about events that took place in White Plains or in Westchester County to the people who were readers of the White Plains Reporter; is that correct?

A. Well, yes. I think occasionally my work may have spread further down than that.

Q. In what way?

A. I believe that occasionally it was outside of Westchester County.

Q. That you moved outside of Westchester County?

A. In the coverage of an event.

Q. All right, but for the people of Westchester County?

A. For the people of Westchester County.

[fol. 214] EDWARD G. TOMPKINS, one of the plaintiffs, having been duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Where do you reside, Mr. Tompkins?

A. 23 Mamaroneck Road, White Plains.

Q. In October of 1938, were you in the employ of the defendant, the White Plains Publishing Company?

A. I was.

Q. Were you still in the employ of the publishing company when it gave up publishing its newspaper on February 28, 1941?

A. I was.

Q. How long had you been in the employ of the Daily Reporter up until the time that it gave up its publishing?

A. It was a little over 12 years.

Q. On October 24, 1938, you were employed by the Daily Reporter in what capacity?

A. I was staff man, assigned to covering Scarsdale, Greenburgh and Elmsford.

Q. What time did you start your work?

A. 8 o'clock in the morning.

Q. And you worked during the day until what time?

A. 5 o'clock, sometimes later.

Q. During that period did you take out time for lunch, and if so, how much time?

A. Yes, I did.

Q. How much?

A. Less than an hour.

Q. On Saturdays, what time did you work in the office?

A. From 8:00 A. M. to 1:00 P. M.

Q. Did you take any time out for lunch during that period?

A. No, sir.

[fols. 215-250] Q. Now, in addition to those hours, did you have any night assignments and night work in the office?

A. Yes.

Q. Did you on occasions work at the office after 5 o'clock at night from Monday to Friday, inclusive?

A. Yes.

Q. And until what time and how many nights a week?

A. Well, it would be at least two nights a week and at least up to 6 o'clock.

Q. So from Monday to Friday—

The Court: What was that last answer?

(Answer read by the reporter.)

Q. So from Monday to Friday, inclusive, you worked from 8:00 A. M. to 5:00 P. M. with not more than an hour out for lunch and on two of those dates you worked—instead of working until 5 you worked till 6; is that correct?

A. Yes, that is right. At least two of those days. It might have been more.

Q. How many night assignments would you have?

A. At least three nights a week.

Q. And the at least three nights a week period would be what, from October 24, 1938, until when?

A. Until the early part of March.

Q. Of 1939?

A. Of 1939.

Q. Do you have a definite date as to the early part of March? Do you have any memorandum there that establishes the date more specifically?

A. I do not have a definite date, no, sir. I know that I started covering the courthouse in the last part of February, but during the first—the last part of February and possibly one or two days in March I was assisting in breaking in a new man to take over my territory.

Q. I see.

A. But I know it was definitely the first week in March.

[fol. 251] **GEORGE SWIFT TROW**, one of the plaintiffs, being first duly sworn, testified as follows:

• Direct examination.

By Mr. Roach:

Q. Mr. Trow, where do you live?

A. Greenwich, Connecticut.

The Court: Speak a little louder, please.

The Witness: Greenwich, Connecticut.

Q. On October 24, 1939, were you in the employ of the White Plains Publishing Company?

A. I was.

Q. In what capacity?

A. As a reporter.

Q. Did you work in the White Plains office at that time?

A. Yes, sir.

Q. What time of the day did you start your work?

A. About 8:15, never later than 8:15 at night.

Q. You started before 8:15 P. M.?

A. Yes, sir.

Q. And you worked until how late?

A. Until at least 4:30 and on a couple of nights a week till 6:30 or later in the morning.

Q. How many nights a week would that be?

A. Six.

Q. So, for four nights a week you worked from before 8:15 P. M. until after 4:30 A. M., and then on two additional nights you worked from before 8:15 P. M. until after 6:30 A. M.?

[fol. 252-275] A. At least two nights a week; sometimes more.

Q. How long did you work this night period?

A. I worked from, let us see in March—I have to refresh my memory on that if it is all right. For the period in question which is from October 24, 1938, until—

Mr. Hanson: Just a minute, your Honor. How are you refreshing your memory?

The Witness: I have a memorandum here, sir.

Mr. Hanson: Another one of these now?

The Court: It is another one, is it not?

Mr. Roach: Oh, well, I object to the tone of the voice "Another one of these."

The Court: The court reporter will not get the tone of the voice and I may forget about it.

The Witness: Till March 8, 1939.

Mr. Hanson: Let us find out more about the memorandum.

The Court: Yes.

By Mr. Hanson:

Q. What is the memorandum from which you are refreshing yourself?

A. The memorandum is a record of the number of hours or the period that I worked all split up into various times. Sometimes I worked nights and sometimes days, and I was on general news in the north county.

Q. In what county?

A. There were several salary changes.

Q. In what county?

A. I used to work up in the northern part of the county.

Q. In the northern part of the county?

A. Yes.

[fol. 276] Q. And the files that you refer to are the files of the printed copies of the newspaper on which you worked?

A. That is correct, sir.

Q. Practically all of your work was done in Westchester County, about Westchester matters; is that not true?

A. With a few exceptions, yes.

Q. Where were they?

A. Well, occasionally I would go over to South Norwalk to cover boxing bouts, and to Greenwich to cover a horse-shoe match but they were very rare.

Mr. Roach: Those were in Connecticut?

The Witness: Yes, sir.

Q. You never reported any overtime?

A. No, sir, except when I was asking for a raise I usually pointed out I was working quite a long while each week.

Q. You got those raises, did you not?

A. I got some of them.

Q. You got quite a number of raises in a short time?

A. I got raises from \$15 to \$25 in three years, yes, sir.

Q. What experience had you had in newspaper work before you came to this paper?

A. I had been on the Pleasantville Townsman in Pleasantville for a year.

Q. That is a weekly newspaper, is it?

A. Yes, sir.

Q. Did you have any daily experience before you came here?

A. No. I had been on a weekly in Greenwich, Connecticut also before that.

Q. You would not say that either one of these exhibits was absolutely accurate, would you?

[fol. 277-285] A. They are absolutely accurate as far as the minimum number of hours worked in any week is concerned, yes, sir.

[fol. 286] WILLIAM L. O'DONOVAN, one of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Roach:

Q. Mr. O'Donovan, you are one of the plaintiffs in this action?

A. I am.

Q. You reside where?

A. At 99 Harvard Drive in Hartsdale, New York.

Q. Were you in the employ of the White Plains Publishing Company, publisher of the Daily Reporter, between October 24, 1938, and the last part of December, 1940?

A. I was.

[fol. 287-294] Q. How long had you been in the employ of the White Plains Publishing Company before your services were terminated?

A. I had first worked there in September, 1927; and with the exception of two periods of absence where I was either traveling or working elsewhere, I had worked for a total of 12 years for the Daily Reporter.

Q. In October, 1938, you were employed in what capacity?

A. I was in the News Department in the Daily Reporter.

The Court: Did you have any title other than being in the News Department?

The Witness: Yes, sir. I was known as the city editor.

Q. What time of the morning did you start your work?

A. I began my work before 8:30 in the morning.

Q. What time did you finish your work for the day?

A. It varied with different days of the week. From Monday through Thursday I worked from 8:30 until after 6; on Fridays I finished after 5, because I went to New York for National Guard drill; and on Saturdays I usually worked till 2 o'clock.

Q. During that time did you take out for lunch and, if so, how much time?

A. I had very little time for lunch. At most, a half an hour. I quite frequently had a sandwich or a glass of milk or a bottle of milk brought in to my desk, and on very rare occasions I would take more than half an hour for lunch.

Q. How about on Saturdays? Would you take any lunch period then?

A. Not until after we had finished the Saturday paper.
[fol. 295] Q. To what extent?

A. Depending on the size of the special edition, and depending on how far in advance it could be prepared.

You understand we have this one news staff that worked the shift during the day with the exception of a very short period when we had a night man on there. We had to get the day's paper out of the way before we could start to work on a special edition.

During the late afternoon we would handle what copy we could, and toward the date of the publication it was incumbent upon me to come back and help in the final blocking up of the paper and checking and proof reading and checking captions and getting pictures and layouts made and otherwise helping to make sure we would have this special page ready so that when we went to press, the day of the week that was normally run, they would either be run off at the same time or they would have been run off the night before and inserted by hand on Election night, depending on the year and depending on whether it was just a city or county election or state or national election. The hours varied.

Q. During the period October, 1938 to January, 1941, did you have in the office of the Daily Reporter teletype machines?

A. We did.

Q. How many?

A. We had two different services during the period on each one, and one service, I think it was the county wire, we had one machine.

Q. That brought news from what source?

A. That brought news from all over the world, delayed through the County News Bureau, which was operating [fol. 296] from here in White Plains. That furnished us with both national and international news from AP, I believe, and we received county news over that wire from the various county bureaus, or, rather, the County Bureau which received it from the various papers in Westchester affiliated with that service.

Then in March, on March 1, 1939, we had to give up that service, and we entered into a contract with INS, the International News Service. They put in two machines, but the same service came over either one. It was simply a factor of safety to have a double machine.

Q. Did you have another teletype machine that brought in your news from the Pleasantville office?

A. For a short period we had a teletype set-up with our Pleasantville office which was operated by Mr. Barnum, and it was received, of course, in the news room of the Daily Reporter. To the best of my recollection, that was, in effect, for about two months.

Q. Is that all?

A. Yes.

Q. These machines that brought in the national news from AP or International News Service, how much of the day were they in operation?

A. They would come on at 6 o'clock in the morning as a rule and be operated until 6 o'clock at night unless we asked to hold the wire open for a special coverage.

Q. Who would take care of the teletype machines in taking news off of them and so on?

A. During the period under discussion it was Mr. Mabee with, of course, the fact that Mr. Hogan or I or anyone who was there and interested in a special story would come in and if the ticker was running over or if we had [fol. 297] some special interest in a story, we would take it off also, but largely the responsibility of taking the copy off the wire and filing it on the various hooks and categories of national interest and local and county and state news would be the job of Mr. Mabee.

Q. Did he turn the ticker off at night, do you know?

A. He usually turned it off at night.

Q. With respect to the International News Service, how many tickers were there?

A. There were two tickers but it was not the same one that alternated. In other words, the service was received on a ticker and we had an extra one there as a matter of safety in case something went wrong, but there was just one service. We happened to have two machines so that we would not miss anything.

Q. Mr. O'Donovan, have you gone through the files of the Daily Reporter between October 24, 1938, and up to the time of the termination of your services—when was that?

A. That was in the latter part of December.

Q. Nineteen hundred and what?

A. 1940.

Q. Did you go through the files?

A. I did.

Q. Of the Daily Reporter during that period?

A. I did. I went through the files covering that period.

Q. Yes. And as a result of that review did you make up a statement showing the overtime you put in for night work?

A. I have a summary here of overtime on the minimum basis. I have gone through the files and picked out certain events that I covered and certain meetings at which I know I was present, and certain factors in the publication which [fol. 298-322] I know that I covered or worked on, such as special editions, and I have compiled a minimum amount of time that I spent on those different things, week by week.

[fol. 323] Q. You had no interest at all in this Civic Federation or in the Community Chest or in the Housing Project or anything else of a civic nature around here except as it related to your work on the Reporter; is that correct?

A. I would not say that is correct; no, sir.

Q. But in this memorandum you charge your employer, of which you were then a stockholder and which you are not now, for overtime for every meeting of any of those civic associations where you actively participated and where you attended; is that not correct?

A. That is not correct. I only put that in the claim for the time that I had to go back to the office and write a story in my capacity as a reporter at those meetings which I attended and for which there is no listing on this summary at all.

Q. Getting back to these tickers and the changes, and getting away from the summary for a moment, is it not a fact that you got very little Associated Press news when you were getting it from the Associated Press tickers?

A. We got very little! I do not know. I was not in the business department, but I do not think we had a franchise to use the A. P. news, so it was almost all county news entirely.

Q. Is it not a fact that during your entire service as city editor as reflected in this complaint here that you used [fol. 324] very little Press Association news in the paper?

A. We did earlier, but when the war broke out—in fact, we ran a full page advertisement toward the end of February, 1939, which had Mr. Tuller's and Mr. Hogan's names at the bottom of the page, that due to the fact that the war would influence everyone's life we would continue or, rather, we would expand our international news, and we then announced that we were taking the service of the International News from March 1, 1939, and we would continue to give local news, but at the same time we would implement it with national and international news because of everyone's interest in world conditions.

Q. You did that for about two or three months?

A. Oh, no. We did that right up until the time—I cannot say that is the time I left because I do not recollect whether the ticker was still there.

Q. Did you not actually go off the regular International News ticker service and just get a telephone pony service from it?

A. That is the reason I qualified my last statement. I am not sure whether the ticker was up at the time I left, but I am quite sure it was there more than three months from the time we instituted the service.

Q. It was a relatively few months, was it not?

A. I would say it was there certainly during the remainder of the year 1939.

Q. The purpose of the White Plains Reporter was to serve the community of White Plains with information, was it not?

A. Correct.

Q. And it specialized in local news; is that not correct?

A. That is correct.

[fol. 325] Q. Is it not also a fact that for many years you never carried any foreign and international news on the front page of your paper?

A. Unless we could get a local angle.

Q. Unless you could get a local angle?

A. Yes.

Q. And in journalistic circles it created rather a sensation when you printed the picture of the ex-King of England on your front page, did it not?

A. That is correct, and I also had a local angle for it.

Q. And that is the reason it went on there and that is the explanation you make?

A. That is correct.

Q. So that your sole purpose was to serve the people right here in White Plains and the adjacent vicinity in Westchester County, was it not?

A. I would like to stop here and say that at the time we printed the picture of the Prince of Wales or ex-King of England was during 1936 and did not come in during this action at all.

Q. Did you print any pictures after that on your front page except local pictures with a local angle, any other pictures?

A. No. From time to time we used mat sections with the mat service from INS and we printed pictures of the war in Europe. We used French, German and other individual pictures of people who were connected with the war. In fact, we put out a special edition one morning devoted to nothing but mat pictures with pictures of the Nazis invading Paris.

Q. You spoke of the composing room running two shifts part of the time. They did not run two shifts just to set up news copy and editorial copy, did they?

A. No.

Q. Did they?

A. No.

[fol. 326] Q. About what proportion of the total contents of your paper was devoted to advertising and what proportion devoted to news?

A. Well, that fluctuates, as you know from your experience in the newspaper field. We had a quota that was difficult to maintain. Any daily paper would be 60-40, perhaps.

Q. Sixty of what?

A. Sixty per cent of advertising and forty per cent of news, but different days of the week, when the advertising was low, we had to have copy ready to fill in. I am sorry to say we would not always achieve that quota or that ratio.

Q. You had certain days of the week, did you not, Mr. O'Donovan, that were known as heavy days and other days as light days?

A. That is correct.

Q. In other words, Tuesdays and Saturdays were usually light days, were they not?

A. That is right.

Q. And your Wednesdays and Thursdays and Fridays on the paper were your heavy days?

A. That is correct.

Q. You would print more pages?

A. We printed more pages, and in order to offset these light days efforts were made to put in special features on Tuesdays to fill up the paper. In other words, it was rather a difficult thing. We called the special pages the home page and the cooking page on Tuesday so as to have the advertising department solicit special advertising and build up that one light day.

Q. The home page was for the readers around here?

A. That is right.

Q. And the cooking page was for the people around here, too?

A. For the people who bought the paper.

[fol. 327] Q. And most of them are right around here?

A. Most of them.

Q. Practically all, were they not?

A. As far as I know.

Q. Yes.

The Court: What do you mean when you say "practically all"? He said, "practically all" and you said "Yes." What do you mean by that?

The Witness: Well, Mr. Hanson means all. He means to repeat that, rather.

The Court: He used the words "practically all" and you said, "Yes." You said first just a majority and then he said "practically all" and you said "Yes." I would like to know what you mean by "practically all." It is your answer that I am interested in and not his question.

The Witness: He said "practically all" and I meant that a majority of our circulation was in Westchester County.

Q. Do you know anything about the circulation figures of the paper, Mr. O'Donovan?

A. Not of my own knowledge. That is, from our records I know what we published from time to time in promotional advertising.

Q. Would you know how many papers were distributed outside of the State of New York?

A. That was never contained in the promotional advertising.

Q. You have not any information on which you could state?

A. I have none, of my own knowledge.

Q. Do you know that any went outside of the State of New York, of your own knowledge?

[fols. 328-346] A. Only that I know we ran a coupon during, oh, June, which was a special announcement to county or local residents who were going away, to have the Reporter follow them, and I know from checking up on it that a certain number of these people would get the paper sent to them when they went out of the State on a vacation to parts of New England or the mountains or the Jersey shore.

Q. You were urging them to keep in touch with the local community news while they were away?

A. That was part of the Advertising and Circulation and Promotion Departments' work.

Q. Did the Advertising Department furnish some copy to keep the composing room busy on these nights that it worked?

A. They did.

Q. You have not any idea as to the proportion between what the Advertising Department furnished and the News Department, have you?

A. I could not say, because some of the copy they had was very hard to set. In other words, these full page grocery ads are very difficult to set. Other times they had an ad with an electro made and a mat and they would just set up the base and toss it on.

Q. As you have stated, Mr. O'Donovan, that the issues of the paper varied from day to day in size and content, is it not a fact that the work week for anyone engaged in news or reportorial work will vary from day to day, according to the breaks of the news?

A. That is correct.

Q. And the assignments to be covered?

A. That is correct.

The Court: What do you mean by that?

[fols. 347-355] Redirect examination.

By Mr. Roach:

Q. When you wrote these editorials, were you formulating your own policies or were you carrying out the policies of the company as laid down by others?

A. I was carrying out the policy that had been established prior to the time Mr. Hogan may have been absent.

Mr. Roach: That is all.

(Witness excused.)

[fol. 356] DEPOSITION OF MR. FANNING

“Q. Mr. Fanning, what do the records of the White Plains Publishing Company show with respect to the national advertising between October 24, 1938 and March 1, 1941?”

My. Hanson: What page is that?

Mr. Roach: The very first question (reading):

“A. Well, the only records I could find are the ledger sheets which show the agency and the account. There are a number of them, but I did not take them with me.

“Q. Do they show that between those dates the White Plains Publishing Company did have national advertising?

“A. Yes.

“Q. And they had national advertising all during that period?

“A. That's right.

“Q. From your inspection of the records would you say it was the usual comparison between national advertising and all the advertising in a paper of similar size?

“A. Yes, I would.

“Q. From your inspection of the records did you learn what advertising mats were furnished by Meyer-Both of Chicago?

“A. Yes, that's right.

“Q. And from your inspection of the records did you learn that half-tone and line cuts for reproducing pictures

were furnished by Basil F. Smith Company of Philadelphia, Pennsylvania?

"A. Yes.

"Q. By 'national advertising' we mean those products that are widely and nationally advertised, such as tobacco, cigarettes, automobiles, tires, radios, washing machines, refrigerators, etc.

"A. Yes.

[fol. 357] "Q. Did you bring along with you the records of the White Plains Publishing Company with respect to its out-of-state circulation between October 24, 1938 and March 1, 1941?"

"A. I brought the only records I could find.

"Q. And what do they show?

"A. They show the original record of the cancellation of the subscriptions as at February 28, 1941. That's the only original record that exists as of that date or any other date, outside of the audit made by the Audit Bureau of Circulation as of the 12 months ending March 31, 1940 and the 12 months ending March 31, 1939, there were at the close of business on February 28, 1941 when the paper discontinued 40, of which 7 of the 40 were going to men of the service. The audit report of March 31, 1940 for the previous 12 months' period shows 46 copies were going to other states other than New York, and the audit report for the 12 months' period ending March 31, 1939 shows 43 going to states other than New York."

And in the other examination, page 4—I think the other things your Honor mentioned are in.

Mr. Hanson: I take an exception to your Honor's ruling.

The Court: Exceptions are automatic so far as the introduction into evidence of offers are concerned, but exceptions are required to the Judge's charge, but it is just as safe to have one anyway.

Mr. Roach: I think that covers it, your Honor.

Mr. Hanson: I except to the reading of those parts of that deposition at this time.

[fol. 358] Now, your Honor, I have several motions. I thought we would go along this afternoon, but if I could have a very brief recess, I think I could get those ordered up the way I want to make them and the way I want to discuss them.

The Court: All right, sir.

(Short recess).

MOTION TO MAKE ALLEGATIONS OF COMPLAINT CONFORM TO THE ACTUAL PROOF

Mr. Roach: I have just one other motion to make, your Honor, and that is a motion to make the allegations of the complaint conform to the actual proof.

Mr. Hanson: I understand that is entirely within the discretion of the Judge, your Honor, but I think that motion certainly should be disallowed in view of the fact that the allegations of that complaint are so far from what he has attempted to prove that we did not even know what we had to meet.

The Court: I think I will grant his motion and give you an exception. In practice here it is within the discretion of the Court.

Concededly, there are two or three paragraphs of the complaint which are confusing or confusing to anyone that attempts to reconcile them.

Mr. Hanson: I note an exception to that.

The Court: Yes.

MOTION TO DISMISS COMPLAINT

Mr. Hanson: Now, if your Honor please, I desire to move to dismiss the complaint in its entirety because of the failure of the plaintiffs to make out a *prima facie* case; and in support of that motion I should like to discuss the [fol. 359] law rather briefly.

(Legal discussion off the record.)

The Court: Concededly, of course, Counselor, there are a great many very involved questions of law.

I think from a practical viewpoint it is better for me to reserve decision on your motion to dismiss and hear your proof. I mean by that, even from your own argument it is a matter of deep study, I think, on my part and rather than determine from just hearing your argument and hearing your opponent argue it, I can see that there are a great many questions involved, and you have raised a great many, and I am going to reserve decision on your motion and hear your proof.

Mr. Hanson: Now, if your Honor please, I cannot finish or get started really with one witness this afternoon. I think if we could meet here tomorrow morning at the usual hour I could proceed and wind up my proof tomorrow.

The Court: I think that is a perfectly natural request. We will adjourn until tomorrow.

(At 3:36 P. M. an adjournment was taken until Thursday, February 18, 1943, at 10:00 A. M.)

[fol. 360]

White Plains, N. Y.,
February 18, 1943,
10:20 A. M.

Met pursuant to adjournment at 10:20 A. M.; present as before.

The Court: Counsel for plaintiffs has furnished to me what appears to be ample authority for the request to amend even the amended demands in the complaint, but, Mr. Roach, I think in order to make any amendment we have to know what it is. You will have to make your computations.

Mr. Roach: I will do that, your Honor.

The Court: When we speak about amending the complaint to conform to the proof that might be computed by the Court, but I cannot compute what you ask as a total amount.

Mr. Roach: I will do that.

The Court: If you want to look at those cases, from the Court of Appeals and one from the Appellate Division, you may do so. You have an exception to my ruling.

Mr. Hanson: I have an exception to the ruling. I assume he will submit those cases to me.

The Court: Oh, yes. They are right there.

Mr. Hanson: I would like to have the citations in the record, if you will give them, Mr. Roach, and then hand the cases to me.

[fol. 361] Mr. Roach: Dunham v. Hastings Pavement Company, 95 App. Div. 360, N. Y.

The Court: What is the particular part that has reference to this question?

Mr. Roach: Knapp v. Roche, 62 N. Y. 614.

(Discussion off the record.)

Mr. Hanson: Yesterday your Honor asked a question while I was arguing but I must confess to a slight physical infirmity which I do not brag about, and that is a slight deafness. I thought you asked me if the Courts had de-

fined commerce and I replied that they had defined commerce.

The Court: I think I asked you whether or not the statute had done so.

Mr. Hanson: So I was informed afterwards. There is in the statute, and I would not want to leave any misapprehension, in Section 3B of the statute a definition of commerce and also, I think, in Section 3B, I will tell your Honor in just a minute—in Section 3B of the Act is a definition of commerce; and in Section 3I of the Act there is a definition of goods, I mean covering those who are engaged in commerce and those who are producing goods for commerce.

The Court: Do you say commerce means commerce according to the definition?

Mr. Hanson: Yes. Commerce means commerce and so the Supreme Court of the United States held about three weeks ago, that is about the answer on that, but I did not [fol. 362] get the question when your Honor asked it.

The Court: I meant a statutory definition of commerce.

Mr. Hanson: Yes. I am ready to proceed, your Honor, if Mr. Hogan will take the stand.

WALTER V. HOGAN, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hanson:

Q. Where do you reside, Mr. Hogan?

A. 2 North Broadway in White Plains.

Q. Were you at any time connected with the defendant, the White Plains Publishing Company?

A. I was.

Q. For how long a period?

A. Twenty-three and a half years.

Q. When did your connection with the defendant cease?

A. February 28, 1941.

The Court: February 28, 1941?

The Witness: 1941.

Q. During the period from October 25, 1938 to February 28, 1941 did you hold any position with the company?

A. Well, I was editor of the paper, and I was an officer of the company, vice president and treasurer.

Q. As editor of the paper were you familiar with the work of the plaintiffs in this case?

A. I was.

Q. Were you familiar with the work of Mr. O'Donovan?

A. I was.

Q. Did you hire Mr. O'Donovan in the first instance?

A. I did.

[fols. 363-371] Q. What was Mr. O'Donovan's position on the paper on October 24, 1938?

A. He was city editor.

Q. Will you explain what the duties of the city editor were?

A. Well, he determined news policies of the paper, and made up the front page and selected news to go in the paper, to be featured above the other news. He made up the assignments, the assignment slips, giving the place to work to each man and woman.

Q. Was it also customary for the city editor to do a considerable amount of writing?

A. Not a considerable amount of writing, no. He wrote heads. He did some writing; not a considerable amount.

Q. Did he have the selection of whatever assignments he gave to himself or did somebody else give them to him?

A. He had his own assignments if he cared to go any place.

Q. He did make assignments, is that correct?

A. Yes.

Q. Did you ever assign him specifically to go out and cover a story between October 24, 1938 and February—and December 31, 1941?

A. Not to cover a story. I may have asked him to go to some of those meetings when I could not go to a meeting where the paper might be interested in having someone there.

Q. Would that be a meeting that would deal with certain of the policies of the paper or certain of the programs or promotions of the paper?

A. That is correct.

Q. It would not be just an ordinary news assignment. It would be something that would have policy connected with it; is that correct?

A. That is right.

[fol. 372] Q. While you were away during that period of illness, he had full charge of the editorial page, did he not?

A. That is correct.

Q. And was entirely responsible for what went on?

A. That is correct. I was not available.

Q. How long were you a stockholder in this paper, Mr. Hogan?

A. For the full twenty-three and a half years.

Q. And at the time the paper suspended what was your approximate interest in it?

A. My approximate interest in the paper?

Q. Yes. One-tenth?

A. One-third.

Q. One-third?

A. Yes.

Q. You were quite familiar with the purposes and policies of the company, were you not?

A. I was.

Q. What was its purpose?

A. Its purpose was to serve the people of White Plains and the neighboring communities with their news and with such advertising as we could present to them and comment on the day's news. It was strictly a local newspaper.

Q. Did you ever go out and seek any out-of-state circulation?

A. No.

Q. Did you not, in fact, during the summer months, urge White Plains residents to keep in touch with the affairs in their local community while they were away, by having the Reporter follow them?

A. Yes.

Q. But other than that you made no effort to build up out-of-state circulation; is that right?

A. None at all.

Q. And you did not want it?

A. No.

[fol. 373] Q. So that any that you had might properly be described, could it not, as just an incident to your purpose of serving this community?

A. Yes.

Mr. Roach: I think I am going to object to that.

The Court: Yes. I think so. Strike the answer out.

Mr. Roach: It seems to me, Mr. Hanson is doing the testifying and Mr. Hogan is just saying "Yes." It is very much leading. I do not like to interrupt.

Mr. Hanson: Well, of course, I understand the rules of leading. I can reframe the question.

The Court: That is not your objection to the last question that it was simply leading. If it is, of course, I will overrule it.

Mr. Roach: All right.

Q. Did you ever have any interest in out-of-state circulation?

A. No.

Q. Did you make any money on any of your circulation?

A. I think not.

Q. Where did the major portion of your revenues come from?

A. Advertising.

Q. What was the major portion of your advertising?

A. Local advertising.

Q. Mr. Hogan, did you have any set office hours at the Reporter's office where a man was supposed to come in, say, at 8 o'clock in the morning and stay there until 6 o'clock or 5 o'clock in the afternoon?

A. They were supposed to come in at 8 o'clock in the morning [fols. 374-382] but there was no time set for them to stay. I mean, they were supposed to come to work at 8 o'clock and work pretty intensively up until the time the paper went to press.

[fols. 383-387] Q. When was it that you found out about this new Wage and Hours Law?

A. In the latter part of 1938.

Q. Well, was it about the time that it became effective?

A. About the time it became effective. It was adopted back in June, I think, and became effective in October.

Q. Was it when it was adopted and passed that you first knew of it?

A. Yes.

Q. Therefore, you knew of it back in June of 1938; is that correct?

Mr. Hanson: Wait a minute. I did not get the date.

The Witness: In the latter part of the summer of 1938, whether it was June or July, I do not know.

Mr. Rogch: June 25, 1938.

Mr. Hanson: That is correct. Effective 90 days thereafter or 120, or something like that.

Q. Does that refresh your recollection that it was in June of 1938?

A. Yes.

Q. And it was then that you had a talk with Mr. O'Donovan?

A. Yes. Some time after that, in the summer there.

Q. And Mr. O'Donovan said to you, "There is a new law coming along. You can't work those people more than 40 hours a week"; is that correct?

A. That is correct.

[fol. 388] The Court: What do you mean by "time copy"?

The Witness: "Time copy" is copy which does not have to run on any particular date. It can be run on Monday and run on Friday.

Q. From time to time did you sponsor various contests of one kind or another?

A. We did.

Q. Tell us some of the things you sponsored. There was a Soap Box Derby, was there not?

A. There was.

Q. And that was sponsored by the Reporter?

A. It was.

Q. And involved a lot of work, did it?

A. It involved a lot of work by Mr. Tuller and Mr. Tukey.

Q. And nobody else?

A. Hardly anybody else.

Q. Did it involve nobody else working on it besides those people?

A. Mr. Tuller handled all the promotion of it practically. Mr. Tukey did practically all the writing of it. He was there during summers. The rest of us took an interest in it. I do not think anybody did a great deal of extra work on it.

Q. Was there any special edition because of that?

A. It was handled by the same two, Mr. Tukey and Mr. Tuller.

Q. Nobody else had anything to do with the special edition?

A. Mabee had a little; not much.

Q. What are some the other things you sponsored along that line?

[fol. 389-392] A. Well, some were contests in co-operation with the theatres. I do not recall just what they were.

[fol. 393] The Court: Would Mr. Mabee have some work?

The Witness: Mr. Mabee would have some. I do not think the others would have, maybe occasionally, Judge.

The Court: All right.

The Witness: Not every day.

The Court: All right.

By Mr. Roach:

Q. How late did Mr. Mabee work?

A. How late did Mr. Mabee work?

Q. That is the question.

A. Maybe around 3 or 4 o'clock.

Q. Who had charge of the teletype?

A. The teletype was very incidental in our office. It required—

Q. Who had charge of it? That is the question.

Mr. Hanson: Let him answer.

A. Who had charge of it?

Mr. Roach: I would like to get an answer to my question.

A. Mr. O'Donovan had charge of it.

Q. The teletype was turned on at what time in the morning?

A. I think it was generally on, turned on by Miss Hasselbach around 7 or 7:30, usually.

Q. You do not know?

A. I do not know for sure.

The Court: What did you get on the teletype? Pardon me for interrupting you.

Mr. Roach: Yes.

[fol. 394] The Witness: When we were affiliated with the County News Bureau county news came in with Associated Press bulletins.

When we went to the International News Service then news came in over that service.

The Court: Did not anyone watch it at all? Did not anybody have the duty of watching it?

The Witness: Mr. Mabee used to take copy off of it.

The Court: Go ahead.

Q. The teletype went off at what time?

A. I am not sure of the time, Steve. I think 6 o'clock.

Q. Who took it off up to that time?

A. It was shut down around 3 o'clock. There was not any occasion for us to look for afternoon news. Mabee would shut it off.

Q. Suppose an important thing came in at 5 o'clock in the afternoon? Would not somebody take it off the teletype?

A. There would not be anything important enough at 5 o'clock off the teletype for us to be interested in. We were not much of an international newspaper—

Q. The teletype—

Mr. Hanson: Let him answer.

A. (Continuing:) We used it mostly for copy paper.

Q. The teletype was running up until 6 o'clock, do you say?

A. That is correct.

Q. News would come in after 3 in the afternoon?

A. Not news that we were interested in.

Q. What type of news were you interested in?

A. There would be nothing that could be taken off the ticker in the afternoon that would be of any good for us until the next day.

[fol. 395] Q. What type of news were you interested in?

A. White Plains and Westchester County.

Q. White Plains and Westchester County news?

A. Yes.

Q. Did that not come over the teletype?

A. County news came over the teletype, a little of it.

Q. Did not that come over during the afternoon?

A. Very little, if any.

Q. And at no time, especially after the competition started, were you interested in national news?

A. Especially after the competition started there was not anything in the afternoon that would interest us on the ticker, because by next morning it would be dead.

Q. I asked you, Mr. Hogan, whether you said especially after your competition started on March 1, 1939, you were interested in national news.

A. Not to any great extent. A little in the morning.

Q. The competition did have a lot of news, did it not?

A. That is right.

Q. And you did have some national news before that, did you not?

A. Before the competition?

Q. Yes.

A. We used hardly any.

Q. Did you have national news?

A. Did we have national news in the paper?

Q. Yes.

A. A little.

Q. And you increased your national news after the competition started, did you not?

A. The paper did, yes. Mr. O'Donovan had an idea that he should meet this competition with national news, and I was ill most of the time, but when I came back I kind of stopped it because I did not think we should use so much.

[fol. 396] Q. You were not interested in keeping up with the competition?

A. Not in so far as the national news was concerned.

The Court: I think we will take a short recess.

(Short recess.)

Q. Mr. Hogan, did you have occasion to do night work?

A. Not very much.

Q. How often would you work nights?

A. I could not say now; Stevè.

Q. About how often; can you give us any idea?

A. Do you mean work in the office?

Q. In the office or outside the office. Did you ever cover any meeting of any kind?

A. Used to go to a lot of meetings. I do not suppose you could call it coverage. Frequently I used it.

Q. In the interest of the newspaper?

A. In the interest of the newspaper, yes, sir.

Q. Did you write a column?

A. Part of the time.

Q. Did you go to any gatherings for the purpose of writing your column?

A. No.

Q. Did you go to any gatherings for the purpose of writing editorials?

A. No.

Q. You wrote editorials?

A. Yes.

Q. And you said that Mr. O'Donovan went to gatherings or meetings on occasions when you could not go?

A. Yes.

Q. Then you did go to gatherings and meetings on behalf of your company, did you not, and when you could not go you sent Mr. O'Donovan; is that the idea?

A. That is right. I did not send him particularly. I [fols. 397-403] asked him if he would go. I mean, it was not a strict order.

* * * * *

[fol. 404] Q. Junk copy?

A. Maybe it is a good name for it, but you had a lot of that on hand, whether it was junk or not. Your newsmen had to prepare it. We did not prepare a great amount of it every Sunday, you know. We just prepared enough to keep them going.

Q. I did not mean you prepared it on Sunday.

A. I would write heads for an hour and you would have all that would keep your men going.

Q. Did the newsmen prepare that?

A. The newsmen prepared very little of it. Most of it came through the mail.

Q. You had a Hollywood column, did you not?

A. We did.

Q. That came over the teletype at 5 o'clock in the afternoon?

A. I do not recall the time it came over.

Q. And there were other features that came over the teletype machine?

A. I do not recall.

Q. How about Dr. McCoy's column; how did that come?

A. By mail.

Q. How about Milton Parker's column?

A. That was on the ticker, I believe.

Q. That came over late in the afternoon, too, did it not?

A. I do not know what time it came over. I do not think it came very late. I do not know.

Q. Do you know what came over the teletype machine during the afternoon?

A. No, not everything that came over in the afternoon.

Q. Do you know how important the stuff was that came over in the afternoon, as far as your business was concerned?

A. As a general rule, everything that came over in the [fols. 405-410] afternoon was not worth very much to us the next day at 2 o'clock in the afternoon.

• • • • • [fol. 411] Q. And he worked how late in the day?

A. Well, he worked pretty hard up to half past 10 or 11 o'clock.

Q. You paid those men for all their work and not for just working hard, did you not?

A. I said he worked right in the office until about half past 10 or 11 o'clock.

Q. I did not ask you how long he worked hard. I asked you how long he worked.

A. In the office until half past 10 or 11 o'clock.

Q. Then what did he do?

A. Then his time was his own to pick up the stuff as he could.

Q. I said, why did he have to get in at 7?

A. That was the arrangement which the sports editor usually made with his assistant. The sports stuff, you see, we closed down—

Q. I did not ask you that.

Mr. Hanson: Let him answer the question.

Mr. Roach: He answered and started something else.

The Witness: We closed the sports off at 11:30.

The Court: I do not think he quite finished.

The Witness: All sports were supposed to be closed off at 11 or 11:30, to get out of the way, for the rest of the paper.

Q. Did the sports come over the teletype first?

A. I do not think we ever used any sports off the teletype. Very occasionally.

Q. All of these men have testified that they took sports off the teletype.

A. I know, but they testified it was a very difficult job going over and ripping a piece of paper off the teletype machine.

Q. They testified to that?

A. They made it appear that it was.

[fol. 412] Q. Is there anything funny about this, Mr. Hogan? Did they testify that it was a very difficult job, tearing off teletype tape?

A. They made it appear as if it was a tough job.

Q. When did you hear that testimony?

A. They tried to make it appear as if it were a very difficult job to take the tape off the teletype, although I do not recall when I heard it, but I do recall it.

Q. The news stories, as you take them off the teletype machine, do you print them as you take them off in the same form?

A. Practically.

Q. Are there some stories that are taken off and changed?

A. Occasionally.

Q. They are headed?

A. Some.

Q. Headed?

A. Yes.

Q. Did Mr. O'Donovan spend a great part of his time down in the composing room?

A. I would not say that he spent a good part of his time there, no.

Q. Did he spend some part of his time there?

A. Yes.

Q. About how much of his time would you say?

A. I do not know the exact time, but if he spent more than half an hour a day, he spent a lot of time down there.

Q. When Mr. O'Donovan took over his own duties and yours when you were away for a good part of the time during one particular year, he became an extremely busy man, did he not?

A. I imagine he did.

Q. Would you say that during that period he worked a great number of hours?

A. Well, I do not know about a great number of hours. He did a great deal of work.

Q. Would you say that during that period he worked [fol. 413-427] more hours than prior to the time of your going away?

A. Well, I was not there. I do not know the hours he put in, but Bill was pretty good on delegating his work to others. I do not imagine he put in a great deal more time.

• • • • • [fol. 428] Q. What do you mean by "a little earlier"?

A. Maybe 7:30, between 7:30 and 8. I do not remember every minute, you know. This is three and a quarter years ago.

The Court: If you did not get there until 10 o'clock, you could not tell very well, I suppose.

Q. What time were they supposed to get there, 7?

A. They were supposed to be there—Mr. Salter, he could come in any time he liked. If he chose to come in at 7:30, he could come in at 7:30 or 7 o'clock. He was sports editor, assistant sports editor, and his time was all his own.

Q. Do you really mean he could come in at any time he wanted to?

A. Mr. Salter could come in at any time he wanted to.

Q. 10 o'clock?

A. If the work were done, he could come in at 10 o'clock.

Q. When was he supposed to start his day?

The Court: Have you not been all over that?

Mr. Roach: This witness has said they were all supposed to be there at 8 o'clock.

Q. You said that, did you not; isn't that correct?

A. That is right.

The Court: If he could not tell what time they left, how could he answer?

Q. After October, 1938, for a while you got your county news how?

A. Over the news ticker.

Q. After October, 1938?

A. Yes. Over the news ticker.

Q. About how long did you get it over the news ticker?

[fol. 429-441] A. Up to February of 1939, I believe. I think it was discontinued probably on the 28th of February, 1939, the next day, I think, that this trouble started.

Q. You got it through the County News Service; was that it?

A. Yes.

Q. And the County News Service had what sort of coverage, courthouse and some, Westchester County?

A. Plus Associated Press Dispatch.

Q. With a wire for Westchester County?

A. Speaking generally, yes.

Q. Was that a service operated by the Macy chain?

A. Yes.

Q. With respect to getting coverage of Westchester County news at that time you merely got it from your ticker, did you not?

A. Yes.

Q. And then that service was taken away from you by the County News Service when?

A. On or about March 1, 1939.

Q. What service, if any, did you have to supplant that?

A. For the County of Westchester?

Q. For the County of Westchester.

A. I think in the meanwhile we also sent Barnum up county, had we not, according to your records? We did not put any extra coverage on for the county. We put a man on the courthouse.

Q. Yes?

A. I believe, and that is all, and bought the International News Service.

Q. The International News Service covered the national and international news, did it not?

A. That is correct.

Q. It did not cover your county news?

A. No.

Q. Prior to the County News Service taking away your news service, you did have a man in the courthouse, did you?

A. Not to my best recollection.

[fols. 442-444] Q. It was up to the foreman of the composing room to distribute the work so that the current stuff got out first and your so-called time copy was held to take up the lag; is that correct?

A. That is right.

Q. To whom did the foreman in the composing room go if he ran short of copy?

A. He would go to O'Donovan.

Q. That is, for news copy?

A. For news copy, yes.

Q. How about advertising? Did you not have any schedule of advertising that had to be published?

A. Oh, yes. Mr. Alexander was the advertising manager.

Q. Did you have an advertising schedule for certain of your advertisers regularly?

A. That is right, yes.

Q. That is, to take so much space on Monday, so much on Tuesday or Wednesday or Thursday and divide it up?

A. Yes.

Q. The foreman of the composing room was supposed to know about those schedules, was he not?

A. Yes.

Q. Was it not one of his duties to check and see that the advertising copy got in there on time to reach the paper?

A. Yes.

Q. So that the composing room had to set more than just news copy?

A. Yes.

Q. You also spoke about the fact on cross-examination that the material which came off the teletype was just incidental. Do you mean that was national and international news; is that correct?

A. That is correct.

Q. You were not interested greatly with that type of news, were you?

A. No.

[fol. 445] Q. Was it ever the policy of the White Plains Reporter to cover the news of all Westchester County thoroughly?

A. No.

Q. I mean, you were not very much interested in the news that happened from day to day in Yonkers?

A. No.

Q. And other parts or some other parts in the county?

A. No.

Q. And when the County News Service was in existence there was a great deal of news that came over the ticker that you did not use, was there not?

A. Yes.

Q. Is it not true, Mr. Hogan, on any news service more is thrown away than goes in your newspaper?

A. Usually, I will say that is true.

Mr. Hanson: I think that is all, your Honor.

Recross-examination.

By Mr. Roach:

Q. Mr. Hanson asked you about Lindbergh which was long before the period—

The Court: Wait a minute. Let us not go back to Lindbergh.

Q. Let us take the period involved when France gave up. Did you run a special on that?

A. Yes.

Q. You ran a special edition?

A. Yes.

• • • • •

[fol. 446] KENNETH OLSON, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Hanson:

Q. Will you tell us where you reside, Mr. Olson?

A. 789 Vernon Avenue, Glencoe, Illinois.

Mr. Roach: Where?

The Witness: Glencoe, Illinois.

Q. What is your present business?

A. I am Dean of the Medill School of Journalism.

Q. Have you had any experience in the field of journalism outside of teaching?

A. Yes. I put in many years in the newspaper business.

Q. Will you please outline your experience?

A. Well, I started in while I was still in high school working in a country weekly, setting type; learned to operate a linotype; sweeping out and attending the presses. Later I worked on the Ashland, Wisconsin, Press as a reporter;

then as city editor on the Duluth News Tribune and the Milwaukee Sentinel and Reporter.

After the war I came back from France and went to work on the Milwaukee Journal. I was successively copy reader, night editor, telegraph editor, make-up editor, assistant Sunday editor and promotion editor.

[fol. 447] Then I went to the Capitol Times at Madison, Wisconsin, the State Capitol, and was managing editor of the Capitol Times, a daily there.

After that I was in financial advertising for a number of years, first as new business and advertising manager of the Commercial National Bank and Union Trust Company, and then had my own financial advertising agency which handled the advertising of some 40 different banks and trust companies and investment houses.

Then in 1930, I think it was, I moved to Minneapolis and became associated with the Northwest Daily Press Association, as market counsellor.

During that period, from 1930 to 1935, I was also an editorial contributor to the Minneapolis Star.

In 1935 I moved to New Jersey as manager of the New Jersey State Press Association.

Then in 1937 I moved to Northwestern. That was my last newspaper work in 1937.

Q. When you speak of Northwestern, that is where you are now stationed?

A. Yes.

Q. As Professor of Journalism?

A. Dean of the School of Journalism, that is right.

Q. While you were in New Jersey did you do any teaching?

A. Yes, I was also the director of the School of Journalism in Rutgers University.

Q. As director of the School of Journalism at Rutgers and as Dean of the School of Journalism at Northwestern, do you attempt to familiarize yourself with what is going on in the newspaper business throughout the country currently?

A. You must or you cannot run a school of journalism.

[fol. 448] Q. You would also say then that you are rather familiar with the business of publishing newspapers in the United States, would you?

A. I have to be.

Q. What is it?

A. What is what?

Q. What is the newspaper publishing business? Let us find that out!

A. A newspaper business is one designed to provide—

Mr. Roach: This may be all very interesting, but I wonder if I could learn the purpose of it.

The Court: It is laying a foundation for expert testimony, I gather.

Mr. Hanson: I think so.

The Witness: May we go back to the very beginning, then, to explain that—

The Court: Do not go too far back.

The Witness: I think it is essential to make my point.

The Court: All right.

The Witness: When our founding fathers set up their new experiment in government here they knew they were surrounded with a world that was ruled by autocracy.

The Court: I do not think we ought to go into all of this.

Mr. Roach: I object to that, too.

Q. All right, Professor. Just go on and say just what is the purpose of publishing a newspaper.

A. Providing information so that your citizens can know what is going on in their local, state and national governments and proceed to exercise their rights as citizens at the polls on the basis of that information.

[fol. 449] Q. How are newspapers published, or what is the basis for the issue?

A. Well, we have weeklies. We have semi-weeklies. We have tri-weeklies. We have dailies. We have some papers that are published on Sundays only.

Q. Does the function of those publications differ in any material respect?

A. Not at all.

Q. The the only difference between them, would you say, is one of frequency of issue?

A. That is right.

Q. Some daily newspapers have more issues than others?

A. Yes, sir.

Q. How is the information which the newspaper publishes generally classified within the business itself?

A. Well, we have news. We have editorial matter. We have feature matter and we have advertising matter.

Q. Does the newspaper as a rule employ a large staff of people?

A. Why, that depends upon the size of the paper.

Q. Assume that you have a paper that had a circulation of from 8,000 to 11,000, would you say that a news staff of 13 to 16 persons was the average size?

A. From 8,000 to 10,000?

Q. To 11,000.

A. Eight thousand to 11,000, 13 to 16 people?

Q. Yes.

A. That would be larger than the average.

Q. That would be larger than the average?

A. Yes.

Q. Where does the newspaper get its revenues, if you know?

A. Circulation, advertising and miscellaneous.

Q. What do you mean by miscellaneous?

A. On most daily papers that amounts to only a fraction [fol. 450] of 1 per cent, maybe of waste paper and other things, but the bulk of your income, of course, comes from advertising. In normal times about from two-thirds to three-fourths comes from advertising, and only one-fourth to one-third from circulation.

Q. On advertising revenues in turn, could you say how they might be distributed?

A. Well, local advertising usually accounts for approximately 75 per cent of your total advertising income.

National advertising in the last few years has yielded probably only 13 to 15 per cent. The remainder itself would come from classified and legal.

Q. Legal advertising is that form of advertising public notices which are required?

A. Yes.

Q. Such as notice of wills and so on and so forth?

A. Yes.

Q. Do you have any occasion to study the nature of the circulation of newspapers?

A. Yes, we do that right along.

Q. How is it distributed, I mean, generally speaking, with reference to the place of publication?

A. Most of our papers are local papers. They have to be. Our country is so big we cannot cover great areas, and our circulation is usually limited to the city and the trade area around it.

By "trade areas" we mean the towns and rural areas in the section from which people normally come to our city as a trade center.

Q. Did you make a study of the circulation in 1941, at my request?

A. Yes, I did.

Q. Do you recall, Mr. Olson, how many daily newspapers there were, roughly speaking, in that year that you made that study?

[fol. 451] A. In 1941 there were approximately 2,000 dailies in the country.

Q. Could you say about what percentage of the circulation of those 2,000 was distributed entirely within the state of publication?

A. I will say about 90 per cent entirely within the state of publication.

Mr. Hanson: If your Honor please, at this point I have here a government document entitled: "A Study of Small Daily Newspapers" which was prepared by the Wage and Hours Division of the United States Department of Labor. On page 4 there is an analysis of newspaper circulation, and on page 5 there is a table dealing with the number of newspapers in the United States, type and size of circulation; and on page 80, in the appendix table No. 2, on page 80, there is a table of circulation of daily newspapers by the size of the city.

I would like to have the marked portion of page 4 and the table on page 5 and the table on page 80 introduced in evidence at this time, and I offer it. Mr. Roach has seen it before. It was attached to some of the pleadings in the earlier stages of the case.

Mr. Roach: We object to that. It is not an interpretive bulletin.

Mr. Hanson: No, no. It is just a factual study that was made for a purpose, but these are facts that are unquestioned, your Honor, about distribution and circulation.

The Court: Let me see it. Is this in the form in which [fol. 452] it is given out by the United States Department of Labor?

Mr. Hanson: I obtained it from the United States Department of Labor.

The Court: Objection overruled. I will take it subject to your offer in evidence of any other part of it that you may want.

Mr. Roach: Thank you.

(Pages from Department of Labor Bulletin received in evidence and marked Defendant's Exhibit A.)

Q. Can you discuss the nature of the services that newspapers render, as you have studied them?

A. Well, the first obligation is to present such news as the editor feels is significant relating to the news of the local community, the state, the nation and the world; not only governmental matters but social and economic matters which may affect the lives of the citizens of the community.

It must then also, of course, through its editorial columns interpret the significance and meaning of these events.

Every newspaper supplies also a certain amount of entertainment matter, and a big part of its responsibility is to supply also the news of the business of that community through the advertising columns and people, particularly the women, in our communities are as much interested in the store news which appear in our advertisements as they are in the news that appear in the news columns.

Q. How would you describe the work that is performed, for instance, by those who gather, write and edit the news on a newspaper?

A. I am not sure that I understand what you mean.

[fols. 453-466] Q. Would you say that they are engaged in professional work or engaged in trade or engaged in a craft?

A. Most certainly in a professional sense.

Mr. Roach: We object to that, if your Honor please.

The Court: I do not believe that is a subject of expert testimony. What this man may think I do not know. That is, if he knows any more about a professional man than a Court, I do not know.

Q. All right. Right on that point: You testified, did you not, that you were the Dean of the School of Journalism of Northwestern University?

A. That is right, yes.

Q. Is that correct?

A. Yes.

Q. How many schools of journalism are there in the United States, Mr. Olson?

A. There are 33 accredited schools.

Q. What do you mean by "accredited schools"?

A. They are accredited by the National Council on Professional Education in Journalism as being professional schools.

Q. Do they require college degrees as a prerequisite to admission or not?

A. Some of them do. Most of them, like law schools and medical schools, require two or three years of college work for admission.

Q. How many other colleges and universities, outside of these accredited schools, teach them, if you know?

A. There are approximately 500 others that offer some work in journalism.

Q. Do you know whether any of the college groups or any state groups or any governmental groups have treated journalism as a profession?

[fol. 467] Cross-examination (continued).

By Mr. Roach:

Q. Have you submitted any brief in any court case recently?

A. None recently.

Q. No court case?

A. No.

Mr. Hanson: I thought you were through?

Mr. Roach: Do you mind if I ask you another question?

The Court: I guess he was through until I asked a question..

Q. Are you familiar with the lawsuit brought by the United States of America against the Associated Press?

Mr. Hanson: I object to it. That does not have anything to do with this case.

The Court: I do not see how it has.

Q. Are you familiar with the contention of the answer of the Associated Press in that case?

Mr. Hanson: I object to that question.

The Court: I do not believe that is material.

Q. Do you agree with this statement contained in the answer of the Associated Press in this case—

Mr. Hanson: I object to that.

The Court: I will let him ask it, but I do not see that it is material.

Mr. Roach: He was asking questions, and this is with respect to the first part of the direct examination.

Q. (Continuing:) —that newspapers supply a necessity and that their business affects the national interest and [fol. 468] public opinion is affected by the extent to which current, accurate and complete information of events and conditions throughout the world is made available; that the extent of such information has increased with the growth and number, range and complicity of public issues, and that the dissemination among the American people of frequent, accurate and world-wide news of current events and conditions through the instrumentality of newspapers is of vital importance to the national welfare?

Mr. Hanson: I object.

The Court: I think he has been telling us that is so, has he not?

A. I certainly agree.

Q. You do agree with that?

Mr. Hanson: Before he answers, I want to object, because the Associated Press case is a highly controversial issue.

The Court: He is not bringing in that case. He is simply asking—

Mr. Hanson: If he agrees.

The Court: He is making a general statement and asking whether he agrees with it or not.

Mr. Hanson: No, he is asking whether he agrees with that particular phrase in the Associated Press's answer to a bill of complaint filed by the Department of Justice.

The Court: What is the difference where it comes from?

Mr. Hanson: Not a bit.

The Court: We are going to take a short recess.

(Short recess.)

[fol. 469] The Court: Do you rest?

Mr. Hanson: Yes, I have rested.

The Court: Do you rest, Mr. Roach?

Mr. Roach: Yes, your Honor.

(Witness excused.)

Mr. Roach: I will just offer in evidence the rest of this Exhibit A so that it is now in evidence in full.

The Court: It cannot do any harm that way, I suppose.

Mr. Hanson: No, indeed, your Honor.

The Court: Are you through, Mr. Roach?

Mr. Roach: We rest.

The Court: Do you want to make any oral argument now or do you want to file a brief?

Mr. Hanson: I want to renew the motions which I have made earlier which your Honor both denied and took under advisement.

The Court: I will reserve decision on those.

Mr. Hanson: All right. I would like to file a brief in this case because the issues are tremendously important, and I presume that it would be the plaintiffs' obligation to file a brief, and the defendant to file a brief in reply. Is that correct, under your procedure?

The Court: That is the way it is generally done here.

Mr. Hanson: I have inquired of the official reporter, and he said it will be probably 10 days before the record will be prepared.

By that time I shall be in California. I shall come back about the 15th of March to my office; so I assume that after the 15th of March the plaintiffs' brief will be served on me and you will allow whatever time I want and I will file a reply brief, your Honor.

The Court: My situation is that I have no schedule for next month, but undoubtedly I will have to sit during the [fol. 470] next months, so that I will have a great deal of time next month. I would like to have it come in during March, because after that I will be engaged for every month up until July.

Mr. Hanson: Assuming that such brief as plaintiffs desire to file is in my hands around the 15th of March—we do not have to have the briefs printed, do we?

The Court: No.

Mr. Hanson: If I had one week I could have my brief in your Honor's hands by the 22nd of March.

The Court: Mr. Roach filed a very comprehensive series of trial briefs, so I would gather that there is not a great deal more that you would want to file.

Mr. Roach: That is right, your Honor.

The Court: You could take that brief and supplement it as you like and serve it on Mr. Hanson, and he will have it before the 15th of March. Then you want how long, Mr. Hanson?

Mr. Hanson: I will want one week, because I will arrive in Washington on the morning of the 15th on my return from California, and I could have it in your Honor's chambers by the 22nd of March.

The Court: That would be very fine.

Mr. Hanson: Shall I send it to this court or Buffalo?

The Court: Send it to Buffalo. I will be there at that time.

I think you had better make a motion on the record for judgment on the pleadings.

Mr. Roach: Yes, your Honor. The plaintiffs move for judgment on the pleadings in favor of each plaintiff.

[fols. 471-531] The Court: I will reserve decision on your motion and I will reserve decision on Mr. Hanson's motions, with the understanding that these papers will be filed. I understand Mr. Roach has to file some memoranda here as to the amounts that are claimed.

Mr. Roach: In regard to the hours that are involved in the exhibits.

The Court: Suppose we leave it this way: When you file your brief with him you specify then exactly what you claim as to each item, for each one of the plaintiffs, and also how much you ask in your prayer for relief for each one of the plaintiffs, and then that will be definite. I would suggest that you do it before the 15th of March, so send your brief to him. Suppose you take about two weeks and send it to him, and also send it to me in Buffalo, and I will receive yours, Mr. Hanson, within a week after the 15th of March.

Mr. Hanson: That is right, your Honor.

The Court: I hope that I will be free so that I can devote my time to it.

[fol. 531a]

Copy

PLAINTIFFS' EXHIBIT No. 15

AGREEMENT

Made this 27th day of March 1939, at New York, N. Y., between King Features Syndicate, Inc., a New York corporation, International News Service Department, herein-after referred to as International News Service and White Plains Publishing Company, Inc., the owner and publisher of the newspaper hereinafter named, hereinafter called the Publisher.

Witnesseth: That for and in consideration of the sum of one Dollar (\$1.00) by each to the other in hand paid, the receipt whereof is hereby acknowledged, and of the mutual covenants herein contained, the parties hereto have agreed:

First: International News Service hereby bargains and sells to the Publisher the right and privilege of publishing in the The Daily Reporter a newspaper printed in the English language at White Plains, N. Y., its report as hereinafter described to wit:

Leased wire printer report, daily except Sunday and agrees as far as practicable to deliver to the Publisher such news report.

Said above described report shall be filed to the Publisher at New York, N. Y., or elsewhere if International News Service so elects.

Second: The Publisher agrees to provide at his expense any necessary quarters for the wire and printer-telegraph machines or other equipment, and to defray the cost of any necessary wire, installation and power current required for the operation of printer-telegraph machines or other equipment, and agrees to receive and accept said news report and to pay therefor without deduction to International News Service, at its New York office, during the term of this agreement and any extensions thereof, the sum of Fifty Dollars (\$50.00) per week for the 1st year; Fifty-one Dollars per week the 2nd year; Fifty-two Dollars (\$52.00) per week the 3rd year; Fifty-three Dollars (\$53.00) per week for the 4th year; Fifty-Four Dollars (\$54.00) per week the 5th year and thereafter, weekly in advance, Provided (1) that International News Service shall not be required

to furnish such Report on Sundays or later than twelve o'clock noon on Christmas Day, or the Fourth of July. (2) that if the telephone or telegraph companies to which tolls are paid on behalf of the Publisher by International News Service raise the tolls on said news report, or increase the rental rate on printer-telegraph machines or other equipment supplied by them; or in case of an increase in the remuneration of telegraph operators by a general revision of wage contracts, said Publisher shall also pay the increases in such tolls, rental or wages to International News Service. (3) that in case of a war or any other extraordinary event requiring an additional or extraordinary expenditure of \$500.00 or more weekly by International News Service in securing and delivering the news of same, International News Service may assess and the Publisher shall pay International News Service an additional weekly sum not to exceed 25% of the Publisher's regular weekly payments, for a period co-incident with said extraordinary expenditure by International News Service. (4) that if said news Report or any wire or other facilities used in the transmission thereof shall be hereafter made subject to any Federal, State or Municipal tax of any kind payable either directly or indirectly by International News Service, the Publisher shall reimburse International News Service for the proportion thereof; as determined by International News Service, properly applicable to said news Report.

Third: The Publisher agrees not to furnish, or permit to be furnished, by its employees or from its office any portion of the International News Service report or any news tips therefrom to any other person, corporation, publication or publisher, or make any other use thereof than in the above-mentioned newspaper, without the written consent of International News Service, and further agrees to respect all release pledges on advance matter and to carry copyright lines on all copyrighted matter, and to carry the International News Service credit line wherever it appears in the service copy.

Fourth: The Publisher agrees to furnish to International News Service at the office of the Publisher for publication and/or distribution all local news and special service from tributary news territory collected by the Publisher, without cost to International News Service.

Fifth: The Publisher agrees to turn on the printer-telegraph machine promptly each day that service is furnished and to protect from ill usage the printer-telegraph machines or other equipment installed for the delivery of this report in its premises and to be responsible for any damage thereto due to its own acts or its own negligence or that of any of its employees. The Publisher further agrees to pay any expense incurred in connection with the transfer or relocation of any equipment after the original installation thereof.

Sixth: It is mutually agreed that International News Service reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news report to any other party or parties.

Seventh: It is further mutually agreed that International News Service, shall, in no event, be liable to the Publisher for any loss, injury, or damage that the Publisher may sustain, or be compelled to pay by reason of the publication of any matter furnished to the Publisher by International News Service.

Eighth: This agreement is made subject to the ability of wire companies to furnish the necessary facilities and the continuance of intermediate clients now on the circuit unless International News Service is satisfied with the rate named in this agreement, or same can be mutually readjusted.

Ninth: This agreement shall continue for five years from March 27th, 1939 and shall thereafter renew itself continuously for periods of five years unless either party shall notify the other by registered letter received at least sixty days before the beginning of the first renewal period or any subsequent renewal periods, of its desire to terminate this agreement, in which event this agreement shall terminate at the beginning of the next renewal period which would have commenced thereafter; otherwise it shall remain in full force and effect, subject to all terms and conditions hereof. In the event of a sale, transfer or consolidation of the aforesaid newspaper property of the Publisher, the Publisher hereby guarantees that his successors or assignees will fulfill the terms and conditions herein contained for the full term of this agreement or any extensions thereof.

Tenth: Should the Publisher fail to make the weekly payments hereinabove provided to be paid, the International News Service shall have the right to discontinue its service to the Publisher without notice, but such discontinuance shall not be construed to be a surrender of any of its legal or equitable rights hereunder. The failure of International News Service to exercise the said right in any instance, however, shall not be construed as a waiver of its right to do so in the case of any subsequent default by the Publisher in making the said weekly payments.

Eleventh: It is expressly understood and agreed that this contract is not binding upon International News Service unless signed by a corporate officer of International News Service, and that it contains all of the agreements between the parties hereto and that there are no oral, collateral or other agreements which are not herein set forth.

This agreement supersedes the one dated Feb. 1, 1939 between the parties hereto.

(Signed) King Features Syndicate, Inc. International News Service Department, by Ward Greene; Publisher, White Plains Publishing Company, Inc., by W. Lee Tuller, Pres.

Witness: As to the King Features Syndicate, Inc., International News Service Department, (Signed) by Walter E. Moss: As to Publisher, _____.

[fol. 532] DEFENDANT'S EXHIBIT A

Bulletin from Department of Labor

(Omitted pursuant to stipulation.)

[fol. 533] IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

OPINION BY HINCKLEY, J.

Mabee v. White Plains Pub. Co., Inc.—This action was tried at a regular term of the court held in White Plains, Westchester County, New York, a jury having been waived.

Plaintiffs sue as individuals under the Fair Labor Standards Act of 1938, claiming compensation for overtime beyond the regular work week. There were originally three additional plaintiffs who for various reasons were unable to be present and their claims were not litigated. Although joined as plaintiffs no one individual had any financial interest in the recovery of any other. The Court of its own motion severed the action. The causes of action of the three plaintiffs who had not appeared personally were united in one action and the trial thereof stayed (Soldiers & Sailors Civil Relief Act, sec. 201; Military Law of New York State, sec. 304; Civil Practice Act, sec. 96). Trial of the causes of action of the above entitled six plaintiffs was had.

Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The Court at this time reaffirms the decision of Mr. Justice Witschief to the full extent thereof. Sustained by credible evidence adduced upon the trial the following objections raised upon the motion to dismiss and upon the trial are overruled. Daily newspapers such as that published by defendant are subject to the Fair Labor Standards Act of 1938, and the provisions of the act are not violative of Article I, Section 8 of the United States Constitution, nor the first or [fol. 534] fifth amendments thereto (*Fleming, adm'r, &c., v. Lowell Sun Co.*, 36 Fed. Sup. 320, reversed on another ground, 120 Fed. [2d], 213, 315 U. S., 784; *A. H. Belo Corporation v. Street*, 36 Fed. Sup., 907; 121 Fed. [2d], 207; 316 U. S. 624; *Walling v. Sun Publishing Co.*, 47 Fed. Sup. 180). The Associated Press is engaged in interstate commerce (*Associated Press v. N. L. R. B.*, 301 U. S. 103). The Fair Labor Standards Act of 1938 is not unreasonable nor arbitrary because it exempts certain weekly newspapers from its application (*Fleming, adm'r, &c., v. Lowell Sun Co.*, *supra*; *Walling v. Sun Publishing Co.*, *supra*). The decision of the motion to dismiss the complaint specifically left to the Trial Court the determination of the question as to whether the activities of the plaintiffs related to interstate commerce. Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and

occupation necessary to the production thereof (F. L. S. A. of 1938, sec. 3 [j]; Interpretive Bulletin No. 1 [5]).

The plaintiffs were all employees of the defendant acting in various capacities in the publication at White Plains, New York, of a daily newspaper, known as "The Daily Reporter." In the composing room of defendant's plant time clocks were installed and accurate records kept of the time spent in service by the employees of that department. However, there were no time clocks installed nor time records kept in the editorial department where plaintiffs were employed. The plaintiffs themselves kept no records of their regular hours nor of their overtime. The Fair Labor Standards Act of 1938, Section 7, prohibited employment over forty-four hours per week for the first [fol. 535] year after the passage of the act; over forty-two hours the second year, and over forty hours the third year and thereafter, *unless* the employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he was employed. The plaintiffs were all employed when the act took effect on October 24, 1938, and were still so employed when the newspaper ceased publication on February 28, 1941. We are therefore concerned with the period between those two dates. Authority is vested in this Court to hear, try and determine the issues herein (F. L. S. A. of 1938, sec. 16 [b]).

Current records being unavailable, plaintiffs produced in court and introduce in evidence the newspaper files for the period last mentioned. Prior to the trial each plaintiff had examined these files and selected the articles therein contained upon which each claimed to have been employed by defendant in addition to the regular work week hours. Each plaintiff testified in each instance to the minimum length of overtime required and actually spent by him in procuring the data and composing the selected articles. For convenience at the trial this testimony was presented in the form of typewritten schedules, the correctness of which was respectively attested to by the sworn testimony of the various plaintiffs. No direct evidence was offered by defendant to prove that the articles were not written by the respective plaintiffs as claimed, nor that the respective plaintiffs did not work overtime, nor that the minimum hours as claimed were not required or spent. The defendant objected to this testimony, claiming that it was

[fol. 536] not definite or accurate, or of sufficient probative value to be admissible. Defendant cannot be heard to complain for its own admitted neglect or refusal to obey the statute and make, keep and preserve accurate records of the wages and hours of plaintiffs (F. L. S. A. of 1938, Sec. 11 [c] and 15 [a] [5]). From the testimony upon the trial it is apparent that the method adopted by plaintiffs is the only manner by which they could attempt to establish their overtime. The period of claimed overtime covers many months and no one could without refreshments of recollection swear to the exact details of his work. There is no superior evidence available or procurable. We are not concerned with the rule of best and secondary evidence, as that relates entirely to documentary evidence (*Carroll v. Gimbel Bros.*, 195 A. D., at 451; C. J. S., Sec. 782, page 707). "'All evidence,' said Lord Mansfield in *Blatch v. Archer*, 1 Cowper 63, 65, 'is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted'" (*Matter of Jordan v. Decorative Co.*, 230 N. Y., at 526; *Travelers-Ins. Co. v. Pomerantz*, 246 N. Y., at 69). The Courts have gone so far as to say that evidence of facts which are necessarily indefinite and which cannot be proved with even an approach to accuracy, is admissible. Provided that no better evidence is available, more cannot be required (*Houghkirk v. President, &c., D. & H. C. Co.*, 92 N. Y., at 225). The duty devolves upon the Court to give or to deny credence to the testimony of the plaintiffs. True, the major portion of news items, editorials and special articles is gathered and written [fol. 537] during the daylight working hours, but major and minor events which go to make up news are not in the habit of punching a time clock or showing due respect for the statutory minimum hours of a work week. News may break at any hour of the day or night, flare up, and in twenty-four hours be cold and uninteresting. The news gathering staff of a wide-awake daily newspaper must be prepared not only to report scheduled events occurring during the regular working hours, but also to stand by and work overtime in order that there may be a coherent uninterrupted record of each day's happenings. Meetings, social functions, entertainments, wartime communiques, and fireside chats, frequently occur in the evening. Weighed in the scales of common experience there is nothing unrea-

sonable in the claim of overtime by one engaged in the gathering, assembling or creating the varied items which go to make up a daily newspaper. In the absence of substantial or detailed contradictory evidence the Court must and does find by a fair preponderance of the believable evidence that the plaintiffs did perform services for the defendant beyond the prescribed hours of designated work weeks and that the minimum overtime hours as claimed were actually spent in the course of their employment.

Defendant contends that the Fair Labor Standards Act of 1938 does not apply to any of these plaintiffs for the reason that every one of them was employed in a bona fide executive, administrative or professional capacity and all come within the exceptions set forth under Section 13 of the Act. That section reads as follows: "Sec. 13. (a) The [fol. 538] provisions of sections 6 and 7 (prescribing the minimum and maximum wages and hours) shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)." The regulations of the administrator (Title 29, Chap. 5, Code of Federal Regulations, Part 541) which define and delimit those terms are too extensive to be quoted herein. So far as they concern an employee employed in a bona fide executive capacity or in an administrative capacity or in a professional capacity, they are separately stated. Each separate definition and delimitation consists of a series of qualifications under alphabetical and numerical headings. Therein the administrator has been meticulous in the use of the conjunctive "and" and the disjunctive "or." For an employee, as defined and delimited by the administrator, is employed in a bona fide executive capacity only when he qualifies under A, B, C, D, E and F of Section 541.1; in a bona fide administrative capacity only when he qualifies under A and also under any one of the subdivisions of B numbered (1), (2), (3) or (4) of Section 541.2 as amended; and in a bona fide professional capacity only when he qualifies under subdivisions A-1, 2, 3, 4 and either 5(a) or 5(b), and B of Section 541.3. The limitations of this opinion prohibit a detailed description of the duties of each plaintiff in relation to such regulations of the administrator. Suffice it to say that no one of the plaintiffs performed services which

[fol. 539] bring him within the definition or delimitation of executive, administrative or professional as defined and delimited by the regulations of the administrator. This finding is consistent with the Interpretive Bulletins of the Wage and Hour Division of the United States Department of Labor. These bulletins while not issued as regulations under statutory authority do carry weight and persuasiveness as an expression of the view of those experienced in the administration of the act (*United States v. American Trucking Associations*, 310 U. S., at 549).

The interesting question arises as to how plaintiffs are entitled to compute their overtime. Section 7(a) of the Fair Labor Standards Act of 1938 provides as follows: "No employer shall . . . employ any of his employees who is engaged in commerce or in the production of goods for commerce (1) for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

The law is clearly established that in the absence of contract or definite arrangement the "regular rate at which he [an employee] is employed" is determined by dividing his weekly salary by the actual hours worked *each* week. Each week that he worked beyond the statutory prohibition [fol. 540] would entitle him to extra compensation for each hour of overtime each week computed at one and one-half times such regular rate at which he was employed (*Overnight Motor Transp. Co., Inc., v. Missel*, 316 U. S. 572, approving this method as used in *Warren-Bradshaw Drilling Co. v. Hall, et al.*, 124 Fed. 2d 42 and other cases in lower court and as employed by the Administrator (Interpretive Bulletin No 4 [9]; *Walling, adm'r v. Belo Corp'n*, 316 U. S. 624). In the latter case at page 632 the Court points out that the "regular rate as so fixed is certainly irregular in a mathematical sense, and that it is difficult to say that it is regular in the sense that either employer or employee knows what it is or can plan on the basis of it." Under this system of computation, the longer an employer compels or asks an employee to work, the

lower the rate of pay at which he is employed. A more simple and fairer method, particularly as to the employee, would be to declare that his weekly salary was compensation only for the hours that he legally could work under the statute. Nowhere is this method suggested save as dictum in *Fleming v. A. H. Belo Corp'n*, 121 Fed 2d at page 211.

In the instant case, however, there was a definite standard set up prior to the passage of the Fair Labor Standards Act of 1938. One Walter V. Hogan, vice president and treasurer of the company, and editor of the newspaper, swore that in 1933 when the N. R. A. came into existence the entire newspaper was reorganized on a forty-hour a week basis; the workweek of each employee was definitely [fols. 541-544] forty hours; the basic week of each employee, including the newsman, was forty hours a week, and that basic forty-hour week was in effect at all times since 1933 (Stenographer's Minutes, page 503). Here we have a definite, uncontradicted agreement of employment that each employee's salary shall be for forty hours' employment each week. In other words, each employee was required to commence work at a definite hour each day and work until a specified hour which, in the weekly aggregate would amount to forty hours. True, under that arrangement he might at times work less than forty hours or more than forty hours a week. But by definite hours of employment each day a week, the regular rate of pay could be mathematically measured as though he were paid by the hour. As an illustration, if he received a weekly salary of \$40 his pay amounted to \$1 an hour. The regular rate at which he was employed is clearly arrived at by dividing his weekly salary by the forty hours upon which basis the entire newspaper had been organized for five years. Thus we have in this instance a method by which we can determine the regular rate at which each plaintiff was employed and by this method the regular rate of each employee must be computed. The employee's overtime commenced after he had worked beyond the statutory forty-four, forty-two, or forty hours prescribed by statute in the respective years.

Judgment may be entered in favor of plaintiffs in accordance with this opinion for unpaid overtime computed as herein indicated at the rate of one and one-half times the

regular rate at which each plaintiff was respectively employed, and an additional equal amount as liquidated damages and attorneys' fees (F. L. S. A. of 1938, Sec. 16[b]).

[fol. 544a] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Hon. William F. Hagarty, Acting Presiding Justice; Hon. John B. Johnston, Hon. Frank F. Adel, Hon. George H. Taylor, Jr., Hon. Harry E. Lewis, Justices.

COURTNEY, M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, Norton Mockridge, George S. Trow and William L. O'Donovan, Respondents,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC., Appellant

ORDER OF REVERSAL—Dec. 29, 1943

The above named White Plains Publishing Company, Inc., the defendant in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 2nd day of June, 1943, in favor of plaintiffs and against defendant, herein, and the said appeal having been argued by Mr. Elisha Hanson of Counsel for appellant, and argued by Mr. Stephen R. J. Roach [fol. 545] of Counsel for respondents, and submitted by Mr. Douglas B. Maggs, Solicitor, United States Department of Labor, as *amicus curiae*, and due deliberation having been had thereon:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unani[~~ous~~]s[~~ous~~]y reversed on the law and the facts, with costs, and the complaint dismissed on the law, with costs.

Enter: John J. Callahan, Clerk.

IN SUPREME COURT OF NEW YORK, WESTCHESTER COUNTY

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, Norton Mockridge, George S. Trow and William L. O'Donovan, Plaintiffs,

against

WHITE PLAINS PUBLISHING COMPANY, Inc., Defendant

JUDGMENT OF REVERSAL

An appeal having been taken by the above named defendant to the Appellate Division of the Supreme Court in and [fol. 546] for the Second Judicial Department from the judgment of the Supreme Court, Westchester County, entered in the office of the Clerk of the County of Westchester on the 2nd day of June, 1943; and the said appeal having been duly heard and the said Appellate Division having thereupon by its order dated December 29, 1943, duly unanimously adjudged that the said judgment so appealed from be reversed on the law and the facts with costs to the defendant and the complaint dismissed on the law with costs to the defendant and the remittitur and record on appeal together with a certified copy of said order of reversal having been duly filed in the office of the Clerk of the County of Westchester on the 10th day of January, 1944, and the costs of the appeal having been duly taxed by the Clerk in the sum of \$1,146.95.

Now on motion of Frances K. Marlatt, attorney for said defendant, it is hereby

Ordered, that the said order of reversal of the Appellate Division dated December 29, 1943, be and the same hereby is made the order of this Court and it is further

Ordered and Adjudged, that the said judgment of this Court herein dated June 2, 1943, and entered in the office of the Clerk of the County of Westchester on the same day be and the same is hereby reversed upon the law and the facts with costs to the defendant and against the plaintiffs, and it is further

[fol. 547] Ordered and Adjudged, that the complaint herein be and the same hereby is dismissed on the law with costs to the said defendant and against the said plaintiffs, and it is further

Ordered and Adjudged, that the defendant recover from the plaintiffs, and each of them, the sum of \$1,146.95, costs as taxed and that the defendant have execution therefor.

Judgment entered this 10th day of January, 1944.

Robert J. Field, Clerk.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Same Title]

OPINION

JOHNSTON, J.:

This action was instituted under section 16 (b) of the Fair Labor Standards Act of 1938 (Chap. 676, 52 Stat. 1060; U. S. C., tit. 29 § 201, *et seq.*) to recover unpaid overtime compensation, an additional equal amount as liquidated damages, and an attorney's fee. From a judgment in favor of plaintiff defendant appeals. The Act applies to all employees engaged in commerce or in the production of goods for commerce, and so far as pertinent, provides:

"See, 3. As used in this act * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof. * * *

[fol. 548] "(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

The principal question presented is: Does the Act apply to appellant, and were its employees—respondents herein—engaged “in any process or occupation necessary to the production” of goods in interstate commerce within the meaning of section 3 (j) of the Act?

Appellant is a domestic corporation and at the times mentioned in the complaint published a newspaper known as “The Daily Reporter” at White Plains, New York. Respondents were employees of appellant during the period in controversy or portions thereof, namely, from October 24, 1938, when the Act became effective, until February 28, 1941, when publication of the newspaper was suspended. [fo' 549] O'Donovan was city editor and at times acted as editor; Mabee was assistant editor and subsequently sports editor. The other respondents were reporters.

Appellant contends that the application of the Act to the newspaper publishing business constitutes an abridgment of freedom of speech and the press, in violation of the First Amendment. Appellant also contends that the application of the Act to its business constitutes an unreasonable, arbitrary and injurious discrimination against it, in violation of its rights under the due process clause of the Fifth Amendment, in that the Act does not apply to all citizens equally because it exempts certain newspapers. More particularly, the Act provides that it shall not apply with respect to “any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand, the major part of which circulation is within the county where printed and published.” * * * (§ 13 [a], [8].) The court held there was no merit to either contention. While the Supreme Court has sustained the constitutionality of the Act (United States v. Darby, 312 U. S. 100, and Opp Cotton Mills v. Administrator, 312 U. S. 126), it has not considered the precise questions now posed. Nor is it necessary for us to pass upon these questions because this judgment must be reversed for the reason that appellant and respondents’ were not engaged in commerce within the meaning of the Act, and Congress never intended it to apply to the situation disclosed by this record.

[fol. 550] It is uncontradicted that the circulation of appellant’s newspaper during the period involved in this suit varied between 9,500 and 11,000; that its purpose was to serve the people of White Plains and the neighboring

communities—but not throughout Westchester County—and that its subscribers resided in those areas. It also clearly appears that appellant had no desire and made no effort to secure "out-of-state" circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces. It is undisputed that at no time were there more than forty-five copies sent out of the state.

The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity, *i. e.*, the local business of publishing a local newspaper. It did not produce goods for commerce within the meaning of the Act and, consequently, plaintiffs were not engaged in any process or occupation necessary to the production thereof.

We are urged to hold that because Congress has not expressly excluded commerce of small volume from the operation of the statute, it applies to all newspapers except those which specifically come within the exemption heretofore set out. But it still remains for the courts—"Examining the Act in the light of its purpose and of the circumstances in which it must be applied"—to say whether Congress intended to exclude local newspapers having an in-[fol. 551] significant out-of-State circulation. (*Labor Board v. Fainblatt*, 306 U. S. 601 607.)

We recognize that the Supreme Court has held that "the power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small." (*Labor Board v. Fainblatt, supra.*) Nor are we unmindful that the Supreme Court has stated that under the Fair Labor Standards Act Congress "has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer." (*United States v. Darby, supra.*) But no case is cited—and independent search has disclosed none—where the Supreme Court has held that the Act applies where only an insignificant and inconsequential part of an employer's product is transported from one State to another. The Supreme Court, however, has recently stated that "Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states." (*Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570.)

Respondents rely on *Schmidt v. Peoples Telephone Union of Maryville, Mo.* (138 F. 2d. 13). There the Circuit Court of Appeals (Eighth Circuit) held that employees, whose duty it was to handle interstate communications, were entitled to recover under the Act even though only one-sixth of the company's income was derived from interstate calls. [fol. 552] But the "Act's coverage depends on the special facts pertaining to the particular business." (Walling v. Jacksonville Paper Co., *supra*, p. 572). Therefore, the Schmidt case (*supra*); if pertinent, is not helpful and may also be readily distinguished. There the defendant, a voluntary association maintaining a telephone service primarily for its members, offered a continuous service to and from six towns in an adjoining State. It admittedly was directly engaged in interstate commerce, which the court emphasized was part of the company's regular business and not "some inconsequential incident" of interstate commerce. There the defendant held itself out as furnishing interstate communication service both to its subscribers and the general public and solicited it. Here the sale of its newspaper outside the State was not a regular part of appellant's business but only an inconsequential incident, resulting from appellant's desire to serve the convenience of a few of its subscribers sojourning out of the State.

Respondents also rely on *National Labor Relations Board v. J. G. Boswell Co., et al.* (136 F. 2d 585), where the Circuit Court of Appeals (Ninth Circuit) held that the defendant Coreoran Telephone Exchange was an instrumentality of interstate commerce within the meaning of the National Labor Relations Act notwithstanding that only 77 of 35,000 toll calls a year went to points outside the State. That case also may be distinguished. There the facilities of a local telephone exchange were an integral part of a vast network of telephone lines which covered the entire nation, and while [fol. 553], those lines were owned by a large number of small telephone companies, such as the Exchange, they were operated as a unified system. In addition, "The Exchange's facilities and lines [were] admittedly available and used for the transmission of interstate messages, both those originating and terminating within the Exchange's system." Hence, the court held the Act applicable even though the interstate business involved but a small part of the entire service rendered by the Exchange.

The Solicitor for the Administrator of the Wage and Hour Division, *amicus curiae*, cites *Muldowney v. Seaberg Elevator Co., Inc.* (39 F. Supp. 275 [E. D. N. Y.]) and quotes from the Interpretative Bulletin in *McKeown v. Southern California Freight Forwarders* (6 Wage Hour Rept. 1016), where, under circumstances unrelated to those in the instant case, the Act was held to apply even though the defendant's interstate business was only a small percentage of its total business. Neither case is relevant because admittedly in each the significant fact was that the interstate business was not casual but regular and an integral part of the every day and every week business, whereas, as heretofore pointed out, appellant's interstate business was not regular but casual; not an integral but only an incidental part of its essentially local business.

The mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the State did not change appellant's business from an intra-[fol. 554] state to an interstate enterprise. Nor is it reasonable to conclude that by so doing appellant should have an interstate character given to the remaining more than ninety-nine and one-half per cent of its business. *Zehring v. Brown Materials*, 48 F. Supp. 740 [S. D. Calif.]; *Goldberg v. Worman*, 37 F. Supp. 778 [D. C. Fla.].) In so holding we merely apply the maxim *de minimis non curat lex*, which the Supreme Court recently indicated was the right, if not the duty, of the courts. (*Labor Board v. Fainblatt, supra.*) To hold otherwise would attribute to the Congress a purpose which it neither contemplated nor designed.

It is also contended that the Act is applicable to appellant because: (a) it purchased newsprint paper and ink outside New York; (b) it secured certain news features from sources outside New York; (c) it obtained the reports of the Associated Press; and (d) it received some advertising from agencies which placed advertising with newspapers throughout the country. The identical argument, under similar facts, was rejected by the Circuit Court of Appeals (Fourth Circuit) in *Schroepfer v. A. S. Abell Co.*, (138 F. 2d. 111, 114).

* It is inconceivable, at least to us, that because appellant purchased, outside New York, materials used in the production of its newspaper, that it is subject to the Act. Obviously, when these supplies were delivered to appellant's plant they arrived at their destination and their interstate

movement ended. Nor do we believe that when appellant [fol. 555] obtained news, reports and other matter from sources outside New York and edited and reproduced some of them in its newspaper, that it became subject to the Act. As stated by Judge Parker in the case last cited: "In the case at bar, there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." The transmission of extra state news by appellant to its readers did not involve that "practical continuity of movement" of which the court spoke in *Walling v. Jacksonville Paper Co.* (*supra*). If respondents' reasoning be adopted, then, as stated by Mr. Justice McReynolds in his dissenting opinion in the *Fainblatt* case (*supra*): "the power to regulate interstate commerce brings within the ambit of federal control most if not all activities of the nation;" For instance, a baker in Brooklyn, who purchases his flour from a concern in Minnesota and whose sales are limited to his local neighborhood, would be engaged in interstate commerce and subject to the Act if, at a customer's request, each week he sent a box of cookies to the latter's son at [fol. 556] the training station in Pensacola, Florida. Of course, no such result was intended by Congress.

Nor is the holding in the *Schropefer* case (*supra*) in conflict with *Associated Press v. Labor Board* (301 U. S. 103), upon which the court below in part relied. The Associated Press is not a newspaper but, as Mr. Justice Roberts pointed out: "an instrumentality set up by constituent members [there are 1,350 of them throughout the United States] who are engaged in a commercial business for profit, and as such instrumentality acts as an exchange or clearing house of news as between the respective members, and as a supplier to members, of news gathered through its own domestic and foreign activities." The operations of the Associated Press, unlike appellant's activities, involve "the constant use of channels of interstate and foreign communication." There is nothing in the *Associated Press* case (*supra*) which

is decisive of or even touches the question presented in the case we are now reviewing.

Respondents also rely on *Fleming v. Lowell Sun Co.* (36 F. Supp., 320; reversed on other grounds, 120 F. 2d. 213; and affd. by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer v. A. S. Abell Co.*, *supra*, p. 115.)

In view of our determination that appellant was not engaged in interstate commerce and that respondents were not engaged in any process or occupation necessary to the [fol. 557-558] production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised. We observe, however, that the award made to each respondent is excessive in so far as it computes overtime compensation on a regular work week of forty hours rather than forty-four hours during the first year's operation of the Act, and on a regular work week of forty hours rather than forty-two hours during the second year's operation of the Act.

The judgment should be reversed on the law and the facts, with costs, and the complaint dismissed on the law, with costs.

[fol. 559] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss.:

Plead in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 16th day of November in the year of our Lord one thousand nine hundred and forty-four, before the Judges of said Court.

Witness, the Honorable Irving Lehman, Chief Judge, presiding; John Ludden, Clerk.

COURTNEY M. MABEE and others, Appellants,
against

WHITE PLAINS PUBLISHING COMPANY, INC., Respondent

REMITTITUR—November 17, 1944

Be It Remembered, That on the 24th day of May in the year of our Lord one thousand nine hundred and forty-four, Courtney M. Mabee and others, the appellants in

this cause, came here unto the Court of Appeals, by Stephen R. J. Roach, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And White Plains Publishing Company, Inc. the respondent in said cause, afterwards appeared in said Court of Appeals by Frances K. Marlatt, its attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Stephen R. J. Roach, of counsel for the appellants; and by Mr. Elisha Hanson (Washington, D. C.) of counsel for the respondent; brief filed by amicus curiae; and after due deliberation had thereon, did order [fol. 560-564] and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

And afterwards, to wit, on the eighth day of March, 1945, an order was duly made amending the remittitur herein, a certified copy of which order is hereto attached and made a part hereof.

Therefore, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, etc.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE, ALBANY

November 17, 1944.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 565] IN COURT OF APPEALS OF NEW YORK

Present Honorable Irving Lehman, Chief Judge, Presiding.

COURTNEY M. MABEE and others, Appellants,

vs.

WHITE PLAINS PUBLISHING COMPANY, Inc., Respondent

ORDER AMENDING REMITTITUR—March 8, 1945

A motion for a reargument and to amend the remittitur in the above cause having been heretofore made upon the part of the appellants herein, papers having been duly submitted thereon and due deliberation thereupon had, it is

Ordered, that the said motion for reargument be and the same hereby is denied and the remittitur amended by adding thereto the following:

Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This Court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

And, the Supreme Court of the State of New York, Westchester County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

Raymond J. Cannon, Deputy Clerk. (Seal State of New York Court of Appeals.)

[fol. 566] IN THE SUPREME COURT OF THE UNITED STATES
ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT
OF CERTIORARI.

Upon the annexed petition of the petitioners, dated February 9th, 1945, the time for the petitioners to apply for a writ of certiorari to review the judgment or decree of the Courts of the State of New York, which final judgment was entered in the Court of Appeals on November 16th, 1944, be and is hereby, for good cause shown, extended sixty days from the date hereof.

Dated, Washington, D. C., February 12, 1945.

Robert H. Jackson, Associate Justice of the Supreme Court.

[fol. 567] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 21, 1945

The petition herein for a writ of certiorari to the Court of Appeals of the State of New York is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Morton Lexow. File No. 49,605 New York, Court of Appeals. Term No. 57. Courtney M. Mabee, Charles K. Barnum, Edward G. Tompkins, et al., Petitioners vs. White Plains Publishing Company, Inc. Petition for writ of certiorari and exhibit thereto. Filed April 12, 1945. Term No. 57 O. T. 1945.